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The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?

Peter McEleavy¹

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Abstract Over the last four decades the 1980 Hague Convention has provided for the prompt return of children to their State of habitual residence. But now that wrongful removals and retentions are most often carried out by primary carers, the majority of whom will be mothers, the instrument has come under increasing scrutiny, not least from the European Court of Human Rights. This article analyses the Grand Chamber judgments in *Neulinger* and *X v. Latvia* and considers how compliance with Article 8 ECHR should be achieved in the application of the Hague Convention; prioritising return or reflection? In so doing it also reflects on whether a summary return mechanism can continue to accord with twenty-first century expectations and norms.

Keywords International child abduction · European Convention, Article 8 · European Court of Human Rights · 1980 Hague Convention · UNCRC 1989 · Best interests · *Neulinger v. Switzerland* · *X v. Latvia*

1 Introduction

For almost 30 years the rationale underpinning the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: 1980 Hague Convention), remained virtually unchallenged—wrongfully removed or retained children should ordinarily be returned to their State of habitual residence and their return should be achieved promptly to negate the harmful effects of the unilateral action. Return was considered moreover to be in the best interests of children for it would

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then allow the most appropriate forum to adjudicate upon their future.¹ Nevertheless it was acknowledged that in a limited number of cases a return might not be in the interests of the individual child and so exceptions were included which, if established, would afford courts a discretion as to how to proceed.² The policy of return was also viewed by the drafters of the Convention to be in the interests of children in general, for they envisaged this would deter unilateral action,³ and of course it would provide an effective framework for children of divided international family units to retain contact with both parents.⁴

For the Hague formula to work effectively and in accordance with the intention of its drafters an extensive and demanding series of requirements must be satisfied. In this, the necessity of expedition in all aspects of the pursuit and conduct of return

¹ Explanatory Report on the 1980 Hague Convention by Pérez-Vera (1982), para. 16, para. 24. At para. 25 the Rapporteur explained: ‘The two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment—both correspond to a specific idea of what constitutes the “best interests of the child”’. And at para. 34: ‘[...] the authorities of each State acknowledge that the authorities of one of them—those of the child’s habitual residence—are in principle best placed to decide upon questions of custody and access.’ The Hague rationale continues to be re-affirmed by leading appellate courts globally: (Australia) *De L v. Director-General, NSW Department of Community Services* (1996) 187 CLR 640, at pp. 648–649; re-affirmed in *RCB as litigation guardian of EKV, CEV, CIV and LRV v. The Honourable Justice Colin James Forrest* [2012] HCA 47, (2012) 292 ALR 617, at para. 2; (Canada) *W(V) v. S(D)* [1996] 2 SCR 108, at para. 36; (Hong Kong) *M v. E* [2015] HKCA 1247, at para. 5.5; (Ireland) *In the matter of the Child Abduction and Enforcement of Custody Orders Act 1991 and in the matter of TM and DM, (minors); The Minister for Justice, Equality and Law Reform as the Central Authority for Ireland (EM), Applicant, v. JM, Respondent* [2003] IR 178, at pp. 185, 187; (New Zealand) *Secretary for Justice (New Zealand Central Authority) v. H J* [2007] 2 NZLR 289, at para. 5; (South Africa) *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC), at paras. 28–31; *KG v. CB and others* 2012 (4) SA 136 (SCA), at para. 19; (United Kingdom) *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at para. 8; (United States) *Lozano v. Alvarez*, 134 S. Ct. 1224, 1228, 188 L. Ed. 2d 200, 207 (2014).

² The primary exceptions are found within Art. 13, 1980 Hague Convention: non-exercise of custody rights; consent/acquiescence in the abduction; return would expose child to a grave risk of harm; child’s objections. Additionally, a return may be refused if not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Art. 20, 1980 Hague Convention), or where more than 12 months have elapsed since the abduction and the commencement of return proceedings, and the child is now settled in his new environment (Art. 12(2), 1980 Hague Convention).

³ Whilst deterrence is not clearly articulated as an objective within the body of the Convention, this implicit goal is acknowledged at several junctures within the Pérez-Vera (1982) Explanatory Report. At para. 16 the Rapporteur explains that an effective way of deterring an abductor is to deprive his actions of any practical or judicial consequences, which will be brought about by the restoration of the *status quo*. This assimilation of remedy and policy is reiterated in the two subsequent paragraphs; first it is affirmed, at para. 17, that the elements of Art. 1, 1980 Hague Convention can be regarded as a single object considered at two different times, and that effective respect for rights of custody and access belongs on ‘the preventive level’. Then it is submitted at para. 18 that promoting return, or taking measures to avoid removal ‘amount almost to the same thing’. The Constitutional Court of South Africa has held that deterrence, like comity, is important and ‘consistent with the values endorsed by any open and democratic society’. *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC), at para. 31. Cf. Schuz (2013), pp. 98–102.

⁴ Cf. UNCRC, Art. 10(2); Charter of Fundamental Rights of the European Union (hereinafter EU Charter), Art. 24(3).

proceedings is of central importance.⁵ Convention hearings must not be transformed into a substantive examination of competing claims to custody,⁶ given that they are simply to be an adjudication as to whether the child's State of habitual residence will be confirmed as the forum which will determine the child's future.⁷ Moreover, the longer an abducted child spends in the State of refuge the more difficult any ultimate return.⁸ Alongside the need for expedition, the drafters were clear that the instrument's limited exceptions would have to be interpreted strictly; were too liberal an interpretation adopted then the return remedy would be deprived of meaningful effect.⁹ Conversely the same caveat could be extended to an overly strict application of the exceptions for then the Convention would risk falling into disrepute since children could be sent back in inappropriate situations.¹⁰

The challenge in finding the correct equilibrium between the promotion of return and the protection of individual children has always been a very real one. Furthermore the difficulties have increased over the 35 years since the Hague Convention was adopted, for not only has the nature of child abduction changed beyond recognition,¹¹ but so has the prevailing legal landscape, whether in the positive obligations falling upon Council of Europe Member States through the interpretation that has been given to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter: ECHR),¹² or in the recognition of the rights and legal status of children, particularly

⁵ See for example: (Canada) *W (V) v. S (D)* [1996] 2 SCR 108, at para. 37; (United Kingdom) *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, at para. 11. This is embodied in statute in certain Contracting States: (Australia) Family Law (Child Abduction Convention) Regulations, reg. 15(2); (New Zealand) Care of Children Act, s. 107, 'Applications to be dealt with speedily'. The issue has long been recognised and upheld by the ECtHR: *Maire v. Portugal*, no. 48206/99, (2006) 43 EHRR 231, at para. 74; *Maumousseau v. France*, no. 39388/05, (2010) 51 EHRR 822, at para. 83.

⁶ Art. 19, 1980 Hague Convention. *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, at para. 119.

⁷ See for example: (Australia) *LK v. Director-General, Dept of Community Services* [2009] HCA 9, (2009) 253 ALR 202, at para. 26; (South Africa) *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC), at para. 30; (United Kingdom) *Re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 29, [2014] AC 1401, at para. 83; (United States) *Seaman v. Peterson*, 766 F.3d 1252, 1258 (11th Cir. 2014), '[...] the central purpose of the Convention and ICARA in the case of an abducted child is for the court to decide as a gatekeeper which of the contracting states is the proper forum in which the issue of custody should be decided.'

⁸ *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, at para. 11.

⁹ The exceptions are: 'to be interpreted in a restrictive fashion if the Convention is not to become a dead letter', Pérez-Vera (1982) Explanatory Report, para. 34. In *F (R) v. G (M)*, 2002 CarswellQue 1738 (CA) (WL), Justice Chamberland stated, at para. 30: '[the Hague Convention] is also, in my view, a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy.'

¹⁰ (Australia) *DP v. Commonwealth Central Authority* [2001] HCA 39, (2001) 206 CLR 401, at paras. 9, 44; (United Kingdom) *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at para. 31; (United States) *Lozano v. Alvarez*, 134 S. Ct. 1224, 1235, 188 L. Ed. 2d 200, 215 (2014).

¹¹ Statistics for 2003 revealed the mother was the abductor in 68 % of cases, in 2008 the figure was 69 %: Lowe (2011a), para. 43.

¹² See below at Sect. 2.3.

after the adoption of the United Nations Convention on the Rights of the Child of 1989 (hereinafter: UNCRC).¹³ It should not perhaps be surprising that courts in many jurisdictions have struggled to find an appropriate balance of the competing interests and objectives.¹⁴ This in turn has given rise to complex issues as to how best interests should be determined, and whether a short, medium or long term perspective should be adopted.¹⁵

Whilst there have long been examples of national courts showing particular flexibility in the application of the Convention or failing to adhere to the limitations of the summary return mechanism, sometimes in respect of particular categories of case,¹⁶ and sometimes for sustained periods of time,¹⁷ it has only been in the last decade that there has been a credible challenge to the prioritisation of prompt return in abduction cases. In its most radical manifestation the re-appraisal of child abduction methodology would in effect curtail the application of the summary return remedy where children were removed or retained by primary carer mothers.¹⁸ Another position is that greater regard should be paid to the interests of abductors where domestic violence is at issue.¹⁹ A further approach is to prioritise the interests of the individual abducted child to ensure that whatever the solution arrived at accords with his best interests.²⁰

¹³ In the United Kingdom, the Supreme Court has recognised in a Hague Convention case that children 'are quite capable of being moral actors in their own right'. *Re D (A Child) (Abduction: Foreign Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, at para. 57. See generally: Freeman (2010), p. 1; Stalford (2012), Ch. 2.

¹⁴ In *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC), at para. 29 the Constitutional Court of South Africa characterised the issue as balancing the short-term and long-term best interests of children.

¹⁵ As regards Art. 13(1)(b), 1980 Hague Convention, it has been accepted by the United Kingdom Supreme Court that it may not only be the child's immediate future which is at issue: *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at para. 35.

¹⁶ It has been held by the Polish Supreme Court that mothers and babies should not be separated: 7 October 1998, I CKN 745-98.

¹⁷ In France, in the early years of the application of the Hague Convention, the *Cour de cassation* regularly upheld a liberal interpretation of the Art. 13(1)(b), 1980 Hague Convention exception, see for example: Cass. Civ. 1ère 12 juillet 1994, *Rev. Crit.* 84 (1995), p. 96 note H. Muir Watt; *JCP* 1996 IV 64 note H. Bosse-Platière, *Defrénois* 1995, art. 36024, note J. Massip.

¹⁸ Judge Dedov in his dissenting opinion in *Adžić v. Croatia*, no. 22643/14, 12 March 2015 has held that the Hague Convention is not suited to situations relating to the end of family life and submits that the separation of a child under seven from his mother will always create a grave risk of harm as understood by Art. 13(1)(b), 1980 Hague Convention. Equally there have long been calls for the Convention not to apply to applications made by left behind fathers whose custody right is limited to a right of veto over the removal of the child from the jurisdiction, for example: Bruch (2004–2005), p. 529. Cf. (United States) *Abbott v. Abbott*, 560 US 1, 130 S. Ct. 1983, 2002; (United Kingdom) *Re D (A Child) (Abduction: Foreign Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619; Schuz (2013), p. 440.

¹⁹ See for example: Kaye (1999), p. 191; Weiner (2000–2001), p. 593; Gray (2003), p. 270; Weiner (2004), p. 701.

²⁰ For example in *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, Judge Pinto de Albuquerque, in his concurring opinion, at para. OI-8, argued: 'the sociological shift from a non-custodial abductor to a custodial abductor, who is usually the primary caregiver, warrants a more individualised, fact-sensitive determination of these cases in the light of a purposive and evolutive approach to the Hague defence clauses'.

Whilst certain academic commentators have called for reform, and there is a degree of repositioning in the manner in which the Hague Convention is applied in one long standing Contracting State,²¹ it is the case law of the European Court of Human Rights (hereinafter: ECtHR) which has brought the *modus operandi* of the instrument to the fore. Much has already been written of the panoply of recent decisions,²² especially the Grand Chamber rulings in *Neulinger*²³ and *X v. Latvia*,²⁴ but in the present article, as well as dissecting the various majority and dissenting opinions, the focus will be on evaluating the judgments against the wider international family law context. In particular, what do the recent Strasbourg judgments indicate about the state of the Hague Convention, particularly its simple, procedural return mechanism and its transposition of the best interests paradigm? And, can a presumptive return mechanism continue to accord with twenty-first century expectations and norms?

2 Prioritising Return

The simplicity of the Hague Convention's summary return mechanism has long been lauded.²⁵ Technically, from the perspective of private international law, it was a great innovation but in its practical operation the instrument has not uniformly fulfilled expectations. The network of States Parties which is edging ever closer to 100, and includes many developing nations, is impressively large,²⁶ but return rates vary quite significantly,²⁷ delays are frequent even in advanced first world members of the network,²⁸ and almost every key provision of the instrument has given rise to

²¹ Switzerland, discussed below.

²² Morley (2011); Walker (2010), p. 649; Silberman (2011), p. 733; Rietiker (2012a), p. 377; Rietiker (2012b), p. 98; Trombetta-Panigadi (2013), p. 599; Carpaneto (2014), p. 931; Beaumont et al. (2015a), p. 39; Keller and Heri (2015), p. 270.

²³ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087.

²⁴ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100.

²⁵ Anton (1981), p. 556.

²⁶ Available at http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last accessed 31 August 2015).

²⁷ The most complete statistical data is that compiled for the 6th Review Special commission: Lowe (2011a, b, c). From this data, analysing solely figures for litigation leading to judicial returns or judicial refusals, it can be seen that the overall judicial refusal rate was 286 (36 %). However, this masks considerable variations, both at regional and national levels. For EU States applying the Brussels IIa Regulation, the figure was 160 (38 %), but this masks a discordance between intra-EU cases 103 (34 %) and non-EU 57 (47 %). For Latin American States the figure was 54 (46 %) and for Australasian states it was 19 (29 %), though there was a major difference between intra-Australasian cases 9 (22 %) and non-Australasian requests 10 (42 %). The variance in judicial refusal rates at a national level is yet more pronounced: Canada 12 %; United Kingdom 14 %; United States 23 %; Germany 41 %; Turkey 44 %; France 46 %; Mexico 52 %; Spain 56 % and Poland 70 %.

²⁸ Lowe (2011a), p. 41.

inordinate amounts of litigation,²⁹ sometimes with divergent interpretations emerging as between or even within Contracting States.³⁰

Where the drafters undoubtedly surpassed expectations however was in creating a new global orthodoxy as regards the treatment of unilateral removals and retentions. The prioritisation of return, the primacy of the child's State of habitual residence as the appropriate forum to adjudicate on the merits of underlying custody disputes,³¹ and the promotion of expedition in decision making³² have all become accepted as global principles and have influenced policy and practice outside the confines of the Hague regime.³³ In 2003 within the European Union, Member States agreed, some reluctantly, to take these principles further in an attempt to realise more effectively the objective of return.³⁴ And in Strasbourg the ECtHR has sought to respond to failings in individual abduction cases by recognising the positive obligations Article 8 ECHR imposes on States and in so doing has attempted to ensure compliance with appropriate minimum standards.³⁵

2.1 Hague Convention

The emphasis placed by the drafters on return was inspired by their perception of the substantive problem, as well as by their appreciation of the weakness of contemporary private international law remedies.³⁶ The removal or retention of children was largely viewed as an action by frustrated fathers who did not exercise a primary care role.³⁷ Thereby in promoting return children would not only be going back to their home environment but to their primary carer. In such circumstances the drafters' use of the expression the restoration of the *status quo ante* can be fully understood.³⁸ At the same time the drafters recognised that the harmonisation of

²⁹ *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, at paras. 12–13. See also the concurring opinion of Judge Pinto de Albuquerque in *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. OI-14, where he refers to the 'damaging effect of differing, contradictory and confusing national case-law'.

³⁰ The most significant current example relates to the interpretation of habitual residence, which is subject to varying interpretations even within the United States, see for example *Murphy v. Sloan* 764 F.3d 1144 (9th Cir. 2014); *Ruiz v. Tenorio* 392 F.3d 1247 (11th Cir. 2004) and the discussion in the New Zealand decisions *Punter v. Secretary for Justice* [2007] 1 NZLR 40, at para. 107.

³¹ Pérez-Vera (1982) Explanatory Report on the 1980 Hague Convention, para. 66.

³² See above n. 5.

³³ See for example the Protocol concluded between members of the British and Pakistani judiciary which sets down guidelines of best practice for the resolution of child abduction cases: <http://www.fco.gov.uk/resources/en/word/uk-pakistan-protocol> (last accessed—via Government Web Archive—on 31 August 2015).

³⁴ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (hereinafter: Brussels IIa Regulation), Official Journal 2003 L 338/1, in particular Arts. 10, 11 and 42. See McEleavy (2005), p. 5.

³⁵ See below at Sect. 2.3.

³⁶ Beaumont and McEleavy (1999), pp. 16–23.

³⁷ Dyer (1982), pp. 19–21.

³⁸ Pérez-Vera (1982) Explanatory Report, paras. 17–18; Beaumont and McEleavy (1999), p. 86.

jurisdiction rules would not be feasible and that recognition and enforcement would be neither viable—as an order might not exist, or if one did, might not reflect the realities of the child's life—nor practicable given the delays which might entail at both stages of the process.³⁹ Once the summary return mechanism began to emerge it can also be understood why the drafters acted with such vigour and determination to ensure that it would be applied in the most optimum fashion.⁴⁰ This was because if the clock could be turned back quickly then the child could in theory resume his previous life with the minimum of disruption.⁴¹

The clauses, strategies and techniques employed in and around the Hague Convention to prioritise return are well known and need not be rehearsed in detail here.⁴² They are found throughout the instrument, from the creation of the Central Authority system,⁴³ to the emphasis placed on expedition,⁴⁴ and the breadth of the summary return mechanism, through the wide scope afforded to custody rights.⁴⁵ The objective is equally supported by the Explanatory Report, most notably in seeking to ensure that the exceptions to return are interpreted restrictively.⁴⁶ In practice however, as the statistical returns for 2008 have shown, this has not uniformly been achieved, and even where returns have been ordered it has rarely been possible to meet the time limits envisaged in Article 11 of the 1980 Hague Convention. A particular challenge for the Convention has been the manner of its implementation. Understandably, particularly for a global instrument of its time, Contracting States enjoy procedural autonomy in the conduct of return proceedings.⁴⁷ Inevitably therefore there are significant differences in practice, whether in the treatment of evidence,⁴⁸ the conduct and indeed types of appeal which may be permitted,⁴⁹ as well as regards the enforcement of return orders.⁵⁰ Good practices

³⁹ Beaumont and McEleavy (1999), pp. 19–21.

⁴⁰ Anton (1981), p. 544.

⁴¹ *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, at para. 11; *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 97.

⁴² See in general Hague Conference (2003).

⁴³ Arts. 6–10.

⁴⁴ Reference can be made to the general requirement in Art. 2, 1980 Hague Convention, the specific obligation for judicial or administrative authorities in return proceedings in Art. 11, as well as repeated references to prompt return in the Preamble, Art. 1, and Art. 7. There is equally the requirement for central authorities to transmit applications without delay in Art. 9, and of course the Art. 11(2) mechanism whereby an explanation can be sought where a decision has not been reached within 6 weeks.

⁴⁵ Beaumont and McEleavy (1999), pp. 48 et seq.

⁴⁶ Pérez-Vera (1982) Explanatory Report, para. 34.

⁴⁷ Cf. criticism of Judge Pinto de Albuquerque in *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. OI-14.

⁴⁸ In many common law States Parties oral evidence is restricted, see Beaumont and McEleavy (1999), pp. 257–258; Hague Conference (2003), pp. 35–36.

⁴⁹ Cf. *Hoholm v. Slovakia*, no. 35632/13, 13 January 2015.

⁵⁰ Enforcement has been an issue of particular importance in ECtHR case law, see below.

have been shared by the Hague Conference, and reforms and improvements have occurred, of which one of the most notable has been in the concentration of jurisdiction in certain States, thereby reducing the number of competent courts and building expertise amongst judges.⁵¹ But at the start of the twenty-first century the real drive for reform and the prioritisation of return was coming, albeit in different ways, from Brussels and Strasbourg.

2.2 European Union

The Europeanization of child abduction law was highly controversial, for the political as well as the practical implications.⁵² It was clear during the negotiation of what became the Brussels IIa Regulation⁵³ that identifying and rectifying weaknesses in the implementation and operation of the Hague Convention in Member States was not a matter of interest.⁵⁴ Rather, as a high profile, cross-border problem, a bespoke European solution was needed which would provide ‘added value’⁵⁵ for the European citizen, and of course reflect well on the European institutions.⁵⁶ The compromise solution which was ultimately achieved, preserved the Hague Convention for intra-Member State abductions, but saw it ‘completed’ by new, directly applicable rules.⁵⁷ These rules have created a more strictly regulated return regime and seek to ensure that the Member State of the child’s habitual residence retains control over the child’s future.⁵⁸ Deterrence is at the heart of the new regime,⁵⁹ and the Hague Convention’s expectation that applications be dealt with in 6 weeks is nominally transformed into a rule.⁶⁰

In theory the protection of the interests of individual abducted children is to be assured by the control exercised by the authorities of the State of habitual

⁵¹ Hague Conference (2003), pp. 29–30.

⁵² Politically, this was a direct challenge to the Hague Conference, and an attempt to increase the competence of the European Community, a goal now fully realized following Opinion 1/13 *International Child Abduction Convention* [2015] 1 CMLR 880. Practically, an established global instrument risked being replaced with little reflection on how this would impact upon third State abductions, as well as on the Hague Convention as a whole.

⁵³ Official Journal 2003 L 338/1.

⁵⁴ McEleavy (2005), pp. 7, 16.

⁵⁵ Case C-491/10 PPU *Aguirre Zarraga v. Pelz* [2011] ILPr 659, at para. 76 (AG). See Carpaneto (2014), p. 931.

⁵⁶ McEleavy (2005), p. 16.

⁵⁷ Recital 17.

⁵⁸ This is achieved by a combination of the review or ‘trumping’ mechanism in Art. 11(6)–(8), Brussels IIa Regulation, the strict jurisdiction rule in Art. 10 and the automatic enforceability rule in Art. 42. See Case C-491/10 PPU *Aguirre Zarraga v. Pelz* [2011] ILPr 659, at para. 44.

⁵⁹ Case C-195/08 PPU *Rinau v. Rinau* [2008] ECR I-5271, at para. 52: ‘The Regulation seeks, in particular, to deter child abductions between member states and, in cases of abduction, to obtain the child’s return without delay.’

⁶⁰ Art. 11(3), Brussels IIa Regulation. The statistical returns gathered for 2008 show that the rule has had no meaningful impact, for only 15 % of return applications between Brussels IIa States were resolved within 6 weeks compared with 16 % of applications received by Brussels IIa States from non-Brussels IIa States: Lowe (2011b), p. 11.

residence,⁶¹ which should moreover avoid divergent assessments by the requested court, where the child is actually present.⁶² But whilst the mechanism has been found to comply with the obligations of Article 8,⁶³ through the application of the *Bosphorus* principle of equivalent protection of fundamental rights,⁶⁴ in practice this attempt to prioritise return does not appear to have delivered the expected dividend for the European Union. There have been many high profile examples where the new rules have failed to operate as intended,⁶⁵ or indeed have been ignored entirely.⁶⁶ And preliminary findings from an empirical study indicate that in practice the child is rarely returned to the State of origin under the Article 11(8) mechanism.⁶⁷

2.3 European Court of Human Rights

In the first decade of the twenty-first century, after holding that the positive obligations Article 8 places on Council of Europe States in the matter of reuniting a parent with his or her child must be interpreted in the light of the Hague Convention,⁶⁸ the ECtHR's engagement with the 1980 instrument soared.⁶⁹ The applications coming before the Strasbourg Court highlighted many of the procedural failings existing in a wide range of European States which were undermining the effective application of the Hague Convention and the return of children. The ECtHR found there to be positive obligations on States to: apply the Hague Convention in an effective manner;⁷⁰ make adequate and effective efforts to enforce a left behind parent's right to the return of his child as well as the child's right to be reunited with the left behind parent;⁷¹ interpret provisions in accordance with international norms;⁷² and to take all necessary steps to facilitate the enforcement of Hague Convention return orders.⁷³ And, in some instances, this has led to general

⁶¹ Case C-491/10 PPU *Aguirre Zarraga v. Pelz* [2011] ILPr 659, at paras. 58-75. As a matter of EU law the rules must be interpreted in accordance with the fundamental rights of the child as set out in Art. 24, EU Charter, see Recital 33 and also Recital 12, Brussels IIa Regulation. See also Lenaerts (2013), p. 1302. Cf. Walker and Beaumont (2011), p. 231; Kuipers (2012), p. 397.

⁶² Case C-491/10 PPU *Aguirre Zarraga v. Pelz* [2011] ILPr 659, at para. 76 (AG).

⁶³ *Povse and Povse v. Austria*, no. 3890/11, [2014] 1 FLR 944. Cf. where a return order is made under Art. 11(8), Brussels IIa Regulation: *Šneersone and Kampanella v. Italy*, no. 1437/09, (2013) 57 EHRR 1180. See Carpaneto (2014), p. 931.

⁶⁴ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, no. 45036/98, (2006) 42 EHRR 1.

⁶⁵ For example: Case C-195/08 PPU *Rinau v. Rinau* [2008] ECR I-5271; Case C-491/10 PPU *Aguirre Zarraga v. Pelz* [2011] ILPr 659.

⁶⁶ *López Guió v. Slovakia*, no. 10280/12, 3 June 2014, at para. 90.

⁶⁷ Beaumont et al. (2015b), p. 124.

⁶⁸ *Ignaccolo-Zenide v. Romania*, no. 31679/96, (2001) 31 EHRR 212, at para. 95.

⁶⁹ See generally: Beaumont (2009), p. 9.

⁷⁰ *Iosub Caras v. Romania*, no. 7198/04, (2008) 47 EHRR 810; *Deak v. Romania and the United Kingdom*, no. 19055/05, (2008) 47 EHRR 1095.

⁷¹ *Iglesias Gil and AUI v. Spain*, no. 56673/00, (2005) 40 EHRR 55.

⁷² *Monory v. Hungary & Romania*, no. 71099/01, (2005) 41 EHRR 771.

⁷³ *Ignaccolo-Zenide v. Romania*, no. 31679/96, (2001) 31 EHRR 212.

measures being taken by States to prevent the recurrence of violations similar to those found by the Court.⁷⁴

Alongside such support for the practical operation of the Hague Convention,⁷⁵ the ECtHR was equally fulsome in upholding the instrument's rationale and return agenda. This was exemplified in the case of *Maumousseau and Washington v. France*⁷⁶ where a primary carer mother complained that the interpretation given by the French courts to the grave risk of harm exception in Article 13(1)(b) of the Hague Convention had been too restrictive and that her daughter's best interests had not been considered completely. The Court held that it was entirely in agreement with the philosophy underlying the Hague Convention, namely deterring the proliferation of international child abductions, restoring the *status quo ante* and leaving the issues of custody to be determined by the courts of the child's habitual residence.⁷⁷ It accepted that the exceptions were to be interpreted strictly and added that were the mother's arguments to be accepted, then both the substance and primary purpose of the Hague Convention would be rendered meaningless.⁷⁸ The Court was satisfied therefore that the child's 'best interests', which lay in her prompt return to her habitual environment, had been taken into account by the French courts.⁷⁹ Encouraging as this reasoning was for supporters of the Hague Conference, *Maumousseau* did prove to be the high water mark for the Court's unrestricted prioritization of return.

3 Prioritising Reflection

Faced with a factual situation where one adult can, *prima facie*, be portrayed as a wrong-doer and another as a victim,⁸⁰ as well as a legal framework which at every level appears to caution against: the subversion of the primary objective of return;

⁷⁴ See for example: Execution of the judgment of the European Court of Human Rights, *Sylvester against Austria* (36812/97), Resolution CM/ResDH(2010)84[1]; Execution of the judgment of the European Court of Human Rights *Bianchi against Switzerland* (7548/04), Resolution CM/ResDH(2008)58[1].

⁷⁵ Such positive obligations continue to be upheld, see for example: *Shaw v. Hungary*, no. 6457/09, [2012] 2 FLR 1314; *López Guió v. Slovakia*, no. 10280/12, 3 June 2014; *Ferrari v. Romania*, no. 1714/10, 28 April 2015.

⁷⁶ *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822.

⁷⁷ *Ibid.*, at para. 69.

⁷⁸ *Ibid.*, at para. 73.

⁷⁹ *Ibid.*, at para. 75.

⁸⁰ The stereotypical characterisation of an abduction may not of course reflect the realities of the family situation, for example where a primary carer mother is fleeing from extreme domestic violence. And so in *Re D (A Child) (Abduction: Foreign Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, at para. 56, it was held that the court's view of the morality of the abductor's actions should not influence a finding of whether any of the Art. 13, 1980 Hague Convention exceptions has been established and that in general moral evaluations of the abductor's actions should not be made. Support for the avoidance of blame, or of seeking to penalise the abductor, is found elsewhere: Case C-211/10 PPU *Povse v. Alpagó* [2011] Fam. 199, at para. 48 (AG); including in pre-Convention English case law: *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, at p. 264; *Re R (Minors) (Wardship: Jurisdiction)* [1981] 2 FLR 416, at p. 425. But it has not been uniform, cf. *Cannon v. Cannon* [2004] EWCA Civ 1330, [2005] 1 WLR 32, at para. 58. Indeed, the nature of certain actions are such that the standard is sometimes difficult to meet,

the manipulation of processes and evidence by abductors; and the conflation of return proceedings with those on the merits; then it can be understood how some courts and policy makers have struggled to achieve an appropriate balance between furthering the interests of children in general and protecting the interests of individual abducted children. And moreover, that courts in some common law jurisdictions might appear to have veered instinctively towards conformity and the apparent simplicity afforded by an order for return.

For all the emphasis on return, it is not automatic as between Hague Contracting States or even, at least yet, as between those EU Member States which are subject to the Brussels IIa Regulation. Indeed an order for non-return in appropriate cases is not in any way a failure, but rather the Convention operating as intended.⁸¹ The challenge for courts in abduction situations is how to align the objectives of the Convention with the contemporary profile of abduction cases, where it is the actions of primary carer mothers which are most often at issue, where a return will not be restoring the *status quo ante* in a literal sense, and where the mother may not have strong connections to the child's State of habitual residence and may face financial challenges there.⁸² In addition, in many Contracting States regard must increasingly be paid to the views of all capable minors and not simply to the objections of older children. Furthermore courts must respond to the requirement for expedition in the conduct of return proceedings, whilst ensuring due respect for procedural fairness.

It is against this context that there is fertile ground for critics of the Hague approach and its emphasis on return and the interests of children in general. However, before considering the most recent case law of the ECtHR in which such criticism has been given expression, regard must be given to the scope which already exists to gain more detailed information about the individual child within the 1980 Convention, as well as the potential for bespoke solutions which exists through the Brussels IIa Regulation.

3.1 1980 Hague Convention

The entire ethos of the Hague Child Abduction Convention, as reflected in its structure and drafting, as well as in the *travaux préparatoires* and its subsequent interpretation by most courts in English speaking jurisdictions, is such that the prioritisation of reflection on the situation of the individual child both appears, and is understood, as being limited. Nevertheless, scope actually exists within the Convention for greater regard to be paid to the situation of individual abducted children, and steps have been taken in certain jurisdictions, through case law and legislation, to ensure that the policy of return does not prevail to such an extent that inappropriate outcomes occur.

Footnote 80 continued

even for the Supreme Court: *Re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 29, [2014] AC 1401. The mother's actions were described, at para. 65, as 'cruel and high-handed'.

⁸¹ *Re D (A Child) (Abduction: Foreign Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, at para. 51.

⁸² Lowe (2011a), where it is explained, at para. 43, that in 2008, 69 % of abductors were mothers. See also *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at para. 7.

3.1.1 A Hidden Mechanism for Greater Reflection

Whilst its material scope is wide, the third paragraph of Article 13 has been little used or considered, indeed it might even be said to be hidden in plain sight. Focussed upon ‘information relating to the social background of the child’, it affords the relevant authorities an apparently unfettered discretion to consider and evaluate issues relevant to the individual child where the Article 13 exceptions are engaged.⁸³ There is no limitation to situations where a court is exercising its discretion where one of the five exceptions has actually been established,⁸⁴ and once the information is provided by the competent authorities in the child’s home State, there is an obligation that it be taken into account.⁸⁵

For all its breadth, the practical impact of the paragraph has though largely been nullified by the ambiguity surrounding its operation. Whilst provision of the background information must be by the authorities of the child’s State of habitual residence, there is no obligation on those authorities to so act, nor a corresponding requirement or even entitlement for the authorities in the requested State to seek such information.⁸⁶ And so whilst information must be considered where provided, there is no actual mechanism in Article 13(3) ensuring its generation.

A better understanding of this somewhat incongruent construction is provided by the terms of Article 7(d). This general provision outlining co-operation between Central Authorities which creates an obligation to take all appropriate measures to exchange information on the social background of the child, is limited to situations where this is deemed ‘desirable’. Leaving to one side whether this implies a shared view on the part of the two authorities concerned, it does reflect, in a more explicit manner, the ethos of the Convention as a whole, one in which concentration on the individual child is treated as the exception and not the rule.⁸⁷

The potential of the provisions have though been embraced in a more positive, child-centric sense in one English speaking jurisdiction with the Constitutional Court of South Africa recommending that the country’s Central Authority—the Office of the Family Advocate—liaise, ‘where possible’ with the corresponding body of the requesting State.⁸⁸ Indeed the Court held that it would be ‘reasonable to expect the Family Advocate to initiate the exchange of information and provide the results of those inquiries to the courts’.⁸⁹ Referring to Article 13(3), the Court

⁸³ Para. 3 commences: ‘In considering the circumstances referred to in this Article, [...]’ See Pérez-Vera (1982) Explanatory Report, para. 117.

⁸⁴ It was in this context that the provision was considered in *Re A (Minors) (Abduction: Custody Rights)* (No. 2) [1993] Fam. 1, at p. 10.

⁸⁵ Cf. *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 108, discussed below at Sect. 3.3.3.

⁸⁶ See Comments of the Canadian Government to the Preliminary Draft Convention: Hague Conference on Private International Law, *Actes et Documents/Proceedings of the fourteenth Session*, vol. III, Child Abduction, 1982, p. 234. Cf. Comments of the German Government, at p. 217, which sought to make the obtaining of such information obligatory. This was however to prevent exceptions being upheld on the basis of cultural prejudice, as to which see Pérez-Vera (1982) Explanatory Report, para. 22.

⁸⁷ Cf. Comments of the German Government, at p. 217.

⁸⁸ *Sonderup v. Tondelli* [2000] ZACC 26, 2001 1 SA 1171, at para. 15.

⁸⁹ *Ibid.*

further noted that where one of the exceptions was at issue it would be helpful for the requesting Central Authority to furnish any relevant information relating to the circumstances of the child.

Elsewhere courts have generally been more circumspect. In other Anglophone Contracting States there has only been isolated consideration of the provision,⁹⁰ with the possibility for delay highlighted,⁹¹ it has though been considered by appellate courts in continental European jurisdictions.⁹² Indeed it was recorded in the Grand Chamber ruling in *Neulinger* that the Swiss appellate court had used the provision to direct specific questions to the requesting Central Authority as to how the child would be cared for if returned to Israel.⁹³ However, following the position taken by the Grand Chamber in *X v. Latvia*, that courts must satisfy themselves that adequate safeguards are provided in the State of origin,⁹⁴ it may in the future assume much greater importance.

3.1.2 Recalibration through Case Law and Domestic Statute

The very low rates of judicial refusals in anglophone jurisdictions have previously been noted.⁹⁵ Indeed at one time English courts were so conscious of the importance of ensuring the exceptions were applied strictly that a reference to it only being in ‘exceptional cases’ where a return should be refused,⁹⁶ evolved into an additional test of exceptionality.⁹⁷ But just as a lax interpretation would subvert the objectives of the Convention, so would one which was excessively strict. The need for correction was quickly recognised, for as Lady Hale noted, an appropriate application of the Convention did not demand that the exceptions never be upheld.⁹⁸ In *Re M* after rejecting any test of exceptionality, she held that the circumstances in

⁹⁰ (England & Wales) *V v. B (A Minor) (Abduction)* [1991] 1 FLR 266, at p. 274; *Re A (Minors) (Abduction: Custody Rights) (No. 2)* [1993] Fam. 1, at p. 10; (Ireland) *M (TM) v. D (M)* [1999] IESC 8, at paras. 19–22; (Scotland) *Viola v. Viola*, 1988 SLT 7, at p. 9; (United States) *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 at p. 377 (8th Cir. 1995).

⁹¹ *Re A; HA v. MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016 (Fam.), [2008] 1 FLR 289, at para. 20. In *Viola v. Viola*, 1988 SLT 7 the Outer House of the Court of Session held that there was no obligation to delay making a ruling on a return application until a social background report had been obtained.

⁹² (France) Cass. Civ. 1^{ère}, 17 Octobre 2007, *Bull. Civ.* 2007 1 N^o 320; (Poland) Decision of the Supreme Court, 7 October 1998, I CKN 745–98.

⁹³ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 31, at para. 41. The Guardianship Division of the Vaud Cantonal Court further noted that the questions were not really answered.

⁹⁴ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 108, discussed below at Sect. 3.3.3.

⁹⁵ See above n. 27.

⁹⁶ *Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam. 242, at p. 251.

⁹⁷ *Z v. Z (Abduction: Children’s Views)* [2005] EWCA Civ 1012, [2006] 1 FLR 410, at para. 31; *Vigreux v. Michel* [2006] EWCA Civ 630, [2006] 2 FLR 1180, at para. 65; *Re M (A Child) (Abduction: Child’s Objections)* [2007] EWCA Civ 260, [2007] 2 FLR 72, at para. 80; *Klentzeris v. Klentzeris* [2007] EWCA Civ 533, [2007] 2 FLR 996, at paras. 21, 36 and the discussion in *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, at paras. 34–37.

⁹⁸ *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, at para. 51. See also (United States) *Lozano v. Alvarez*, 134 S. Ct. 1224, 1235, 188 L. Ed. 2d 200, 215 (2014): ‘[...] the Convention reflects a design to discourage child abduction. But the Convention does not pursue that goal at any cost.’

which return may be refused were themselves exceptions to the general rule: ‘That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention’.⁹⁹ This recalibration in the application of the exceptions is in line with the approach adopted by leading courts in other common law Contracting States. In *DP v. Commonwealth Central Authority*¹⁰⁰ the High Court of Australia rejected a view that a narrow construction should be given to the grave risk exception, noting simply that ‘The exception is to be given the meaning its words require’. The Constitutional Court of South Africa has reacted similarly noting that: ‘The paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention’.¹⁰¹ In Switzerland a more formalised approach has been adopted, to respond essentially to situations involving primary carer abductions effected by vulnerable mothers where their return is not an option and where their children would be placed in care if sent back.¹⁰² Under a statutory rule, if three cumulative criteria are satisfied in such circumstances, then an intolerable situation will be deemed to exist for the purposes of Article 13(1)(b) of the Hague Convention.¹⁰³

3.2 European Union

In the light of the primary emphasis of the revised rules on child abduction, in reinforcing return and the control exercised by the Member State of the child’s habitual residence, it might be questioned whether there could be any scope for prioritising reflection in the conduct of European abduction proceedings. But there is indeed potential for this to be achieved, albeit indirectly. First, alongside the more exacting rules applicable to intra-EU removals and retentions are provisions which ensure compliance with fundamental rights as contained within the EU Charter.¹⁰⁴ And so a court cannot refuse to return a child unless the applicant has been given an opportunity to be heard,¹⁰⁵ and when applying Articles 12 and 13 of the Hague Convention, the child must be given the opportunity to be heard, unless this appears inappropriate having regard to his or her age or maturity.¹⁰⁶ Whilst these may open the door to greater reflection on the situation of the individual child and the most

⁹⁹ *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, at para. 40.

¹⁰⁰ *DP v. Commonwealth Central Authority* [2001] HCA 39, (2001) 206 CLR 401, at paras. 9, 44.

¹⁰¹ *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC), at para. 33.

¹⁰² *Loi fédérale sur l’enlèvement d’enfants et les Conventions de la Haye sur la protection des enfants et des adultes*, 21 December 2007, considered in Bucher (2008), p. 139. The entry into force of the Federal Act was welcomed by the UN Committee on the Rights of the Child, CRC/C/CHE/CO/2-4, 26 February 2015. See also Weiner (2008), p. 335.

¹⁰³ Art. 5, *Loi fédérale sur l’enlèvement d’enfants et les Conventions de la Haye sur la protection des enfants et des adultes*: the placement of the child with the applicant parent would manifestly not be in the child’s interests; the abductor is not in a position to care for the child in the State of habitual residence, or it is not reasonable to expect this; and the placement of the child in foster care is manifestly not in the interests of the child. See Bucher (2008), p. 157.

¹⁰⁴ Official Journal 2012 C 326/02.

¹⁰⁵ Art. 11(5), Brussels IIa Regulation, cf. Art. 47(2), EU Charter.

¹⁰⁶ Art. 11(2), Brussels IIa Regulation, cf. Art. 24(1), EU Charter.

appropriate outcome, other avenues will depend on the motivation of the relevant judicial and administrative authorities.¹⁰⁷

Under Article 11(4) of the Brussels IIa Regulation a return cannot be refused on the basis of Article 13(1)(b) if it is established that ‘adequate arrangements have been made to secure the protection of the child after his or her return’. The Regulation does not specify how this is to be achieved or indeed where the burden lies, but the opportunity is there for cooperation to ensure effective protective measures are put in place.¹⁰⁸ It is to be noted that in the expanded, 2015 version of the Commission’s Practice Guide for the Application of the Brussels IIa Regulation,¹⁰⁹ it is put forward that the mere existence of protective procedures in the Member State of origin is not sufficient, rather ‘it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question’.¹¹⁰ Were measures put in place through the forthcoming revision of the Brussels IIa Regulation to give effect to this guidance, this would mark a significant step forward, both in protecting children and facilitating safe returns. Integrated solutions which ensure that the best interests of the individual child are secured can also be achieved where courts respond positively and cooperate where the Regulation’s Article 11(8) is activated where a non-return order is issued under Article 13 of the Hague Convention.¹¹¹ Unfortunately current evidence does not indicate that this is regularly being achieved.¹¹²

3.3 European Court of Human Rights

3.3.1 *Neulinger v. Switzerland*

The re-alignment in the ECtHR’s position such as to place increased emphasis on the situation of the individual abducted child rather than the policy of return, stems from the remarkable Grand Chamber ruling in *Neulinger*,¹¹³ although its roots may be found in earlier dissenting opinions, notably that of Judge Zupančič in *Maumousseau*.¹¹⁴ In the aftermath of its delivery, the 16 judge majority

¹⁰⁷ McEleavy (2005), p. 34.

¹⁰⁸ It has been held that Art. 11(4), Brussels IIa Regulation reflects the traditional English practice of the applicant parent giving undertakings to the court: *Re Y (A Child) (Abduction: Undertakings Given for Return of Child)* [2013] EWCA Civ 129, [2013] 2 FLR 649, at para. 1. See also *Kinderis v. Kinderene* [2014] EWHC 693 (Fam.), at para. 46.

¹⁰⁹ Available at http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf (last accessed 31 August 2015).

¹¹⁰ Para. 4.3.3. This would accord with recent guidance of the ECtHR, see *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 108, discussed below at Sect. 3.3.3.

¹¹¹ McEleavy (2005), pp. 29 et seq.

¹¹² Beaumont et al. (2015b), p. 124. See also Case C-491/10 PPU *Aguirre Zarraga v. Pelz* [2011] ILPr 659. Cf. *Re A (Custody Decision after Maltese Non-Return Order: Brussels II Revised)* [2006] EWHC 3397 (Fam.), [2007] 1 FLR 1923; *M v. T (Abduction: Brussels II Revised, Art 11(7))* [2010] EWHC 1479, [2010] 2 FLR 1685.

¹¹³ *Neulinger v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087.

¹¹⁴ *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822.

opinion in *Neulinger* generated great controversy,¹¹⁵ many pages of academic¹¹⁶ and judicial commentary¹¹⁷ as well as the remarkable extra-judicial intervention of the Court's then president, Judge Costa,¹¹⁸ and all for appearing to represent a *volte face* on the part of the Strasbourg Court in how the ECHR should be applied in Hague Convention child abduction cases. In large measure this was down to the manner in which the majority judgment had been constructed,¹¹⁹ though it is an open question whether this was by design, omission, through the mistaken belief that the Court's position *vis-à-vis* the Hague Convention was sufficiently firmly anchored to withstand any challenge, or indeed as a result of the vagaries of collegiate judgment writing, where a range of different views clearly existed, and where staffers are involved in the process.¹²⁰

One issue free from doubt was that by July 2010 the facts of the case had become exceptional, and of a nature that would surely have been beyond the contemplation of the Hague Convention's drafters.¹²¹ Moreover it was the Strasbourg processes themselves which were in large measure responsible for this exceptionality, at least in respect of the extreme delays.¹²² The child, then aged 7, had been in the State of refuge, Switzerland, for 5 years, 3 awaiting the conclusion of his and his mother's ECHR application; he had not seen his father during that time, the latter having made no attempt to establish contact,¹²³ and prior to the wrongful removal the father's contact had been limited by the Israeli courts to twice weekly and on a supervised basis.¹²⁴ That the enforcement of the child's return after such a period of time and in such circumstances was undesirable, and would have breached his rights under Article 8 ECHR, could hardly be regarded as controversial.

The controversy and harm lay rather in the manner in which this conclusion was reached. As noted the Court had previously provided unstinting support for the Hague Convention and its objectives of return and deterrence. Now, when faced

¹¹⁵ See for example the Statement of the Secretary General: Van Loon (2011); Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (1–10 June 2011), Conclusions and Recommendations. Available at: http://www.hcch.net/upload/wop/concl28sc6_e.pdf (last accessed 31 August 2015).

¹¹⁶ See above n. 22.

¹¹⁷ *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at paras. 19–28. At para. 22 Lady Hale and Lord Wilson, delivering the judgment of the Court stated: '[...] the Court gives the appearance of turning the swift, summary decision-making which is envisaged by the Hague Convention into the full-blown examination of the child's future in the requested state which it was the very object of the Hague Convention to avoid'.

¹¹⁸ Costa (2011).

¹¹⁹ See generally: White (2009); Neuberger (2014), para. 35. And for a candid, first hand critique of the manner in which ECtHR judgments are compiled, see: Loucaides (2010), p. 61.

¹²⁰ Indeed, 7 members of the 16 judge majority adhered to a concurring or separate opinion.

¹²¹ Cf. *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, at para. 4.

¹²² After allocation to the First Section, the President of the Chamber exercised the discretion granted under Art. 39 of the Rules of Court to grant interim measures, which led to the return order being stayed, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 5. The exceptional nature of such an outcome is discussed by Rietiker (2012a), p. 405.

¹²³ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 47.

¹²⁴ *Ibid.*, at para. 24.

with the challenge of a difficult case, it placed particular emphasis on the rights of the individual child and Article 3(1) UNCRC, but without overt indication that its comments were not intended to be of general application in each and every child abduction case. There are many elements of the majority opinion which might *prima facie* suggest that the Court *was* reversing its previous position, certainly if these were to have general application. But almost hidden in the shadows of those startling statements are sufficient indicators to justify the position of Judge Costa that the Court was not embarking upon a wholesale revision in the interpretation and application of Article 8 ECHR in Hague Convention cases. Nevertheless, *Neulinger* has acted as the catalyst for the international child abduction human rights debate to be re-framed and, *X v. Latvia* notwithstanding, it has created the conditions, sometimes taken,¹²⁵ sometimes not,¹²⁶ for Chambers of the Strasbourg Court to stray some distance from the spirit of the Hague Convention.

3.3.1.1 Best Interests¹²⁷ In referring to Article 3(1) UNCRC to provide assistance in interpreting Article 8 ECHR, the Grand Chamber was not embarking upon a new approach. In *Demir v. Turkey*¹²⁸ the Grand Chamber had already noted how the specificities of the substantive obligations imposed on Contracting States by the ECHR ‘may be interpreted, first, in the light of relevant international treaties that are applicable in the particular sphere’¹²⁹ and then gave examples, including where reference had been made to the UNCRC.¹³⁰ Indeed, passing reference had been made to the UNCRC in earlier applications concerning the Hague Convention, including *Maumousseau*.¹³¹ In the United Kingdom this approach to interpretation has not only been accepted, but the Supreme Court itself has paid regard to the

¹²⁵ *Phostira Efthymiou et Ribeiro Fernandes v. Portugal*, no. 66775/11, 5 February 2015. In cases prior to the Grand Chamber ruling in *X v. Latvia* see: *Raban v. Romania*, no. 25437/08, [2011] 1 FLR 1130; *B v. Belgium*, no. 4320/11, 10 July 2012.

¹²⁶ *Rouiller v. Switzerland*, no. 3592/08, 22 July 2014.

¹²⁷ See Eekelaar (2015), pp. 3 et seq., where it is argued that the distinction between ‘direct’ and ‘indirect’ measures concerning a child should not merely concern the weight to be accorded to best interests—the ‘determining’ consideration as opposed to the ‘primary’ consideration—but also the structure of the reasoning employed. In ‘indirect’ cases the focus should be ‘on reaching the “best” solution to the issue to be decided’ rather than on determining which outcome will be best for the individual child. See also Fiorini (2016).

¹²⁸ *Demir v. Turkey*, no. 34503/97, (2008) 48 EHRR 1272, at para. 69. See also *Burnip v. Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117, at para. 21.

¹²⁹ Cf. Vienna Convention on the Law of Treaties, 1969, Art. 31(3)(c) and the discussion for and against such an approach to interpretation in Rietiker (2012a), pp. 384 et seq. Cf. Lord Sumption where he expresses, extra-judicially, his scepticism of the expansion of Art. 8 ECHR rights generally.

¹³⁰ *Pini v. Romania*, no. 78028/01, 22 June 2004, at paras. 139, 144; and *Emonet v. Switzerland*, no. 39051/03, 13 December 2007, at paras. 65–66. See generally Kilkelly (2000), p. 87.

¹³¹ *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822, at para. 44. See also *Iglesias Gil and AUI v. Spain*, no. 56673/00, (2005) 40 EHRR 55, at para. 28; *Maire v. Portugal*, no. 48206/99, (2006) 43 EHRR 231, at para. 56; and the non-Hague Convention case *Bajrami v. Albania*, no. 35853/04, (2008) 47 EHRR 547, at para. 32.

UNCRC, finding that it can be relevant to questions concerning the rights of children under the ECHR,¹³² and this notwithstanding the jurisdiction's dualist tradition, where the 1989 Convention is not part of the law.¹³³

If the fact of the Grand Chamber's reference to Article 3(1) was not remarkable, then the manner in which it was done, and the interpretation afforded to 'best interests', certainly were.

3.3.1.1 Presentation of Article 3(1) UNCRC In accordance with convention, reference was made to 'Relevant Domestic and International Law and Practice' immediately after consideration of the facts of the application.¹³⁴ In this the starting point for the *Neulinger* majority was not the Hague Child Abduction Convention, as had occurred in the Chamber ruling¹³⁵ or in the *Maumousseau* judgment,¹³⁶ but the UNCRC.¹³⁷ On its own one might question whether any significance, symbolic or other, should be drawn from such a difference in ordering,¹³⁸ given the Court had not been consistent in this regard.¹³⁹ But there were factors more clearly indicative of a change in approach. First, the provisions of the UNCRC were announced by an explanatory subtitle: 'A. Protection of the rights of the child'. Never before had such a subtitle been incorporated within any ECtHR judgment,¹⁴⁰ a not insignificant fact given the propensity for the near formulaic repetition of phraseology and legal explanations in Strasbourg case law. Second, the presentation of the articles of the UNCRC only included the Preamble, as well as Articles 7, 9, 14 and 18, with Article 3(1) mentioned thereafter.¹⁴¹ Whilst the Grand Chamber quoted from the Committee on the Rights of the Child that the UNCRC 'must be considered as a whole, with the relationship between the various articles being taken into

¹³² *R. (SG and others) v. Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at paras. 86, 101 and, in particular, at para. 137. See also *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250, at paras. 39 et seq.

¹³³ *R. (SG and others)*, at paras. 82, 115, 137. Cf. contrary view of Lord Kerr, at para. 257.

¹³⁴ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 48.

¹³⁵ *Neulinger and Shuruk v. Switzerland* [Chamber], no. 41615/07, 8 January 2009, at paras. 36–39.

¹³⁶ *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822, at paras. 43–44.

¹³⁷ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 48.

¹³⁸ Cf. Rietiker (2012a), p. 391.

¹³⁹ In previous child abduction cases differing approaches were followed: (UNCRC cited first) *Iglesias Gil and AUI v. Spain*, no. 56673/00, (2005) 40 EHRR 55, at para. 28; *Maire v. Portugal*, no. 48206/99, (2006) 43 EHRR 231, at para. 56; (Hague Convention cited first) *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822, at paras. 43–44; *Neulinger and Shuruk v. Switzerland* [Chamber], no. 41615/07, 8 January 2009, paras. 36–39, cf. analysis at para. 74; (only Hague Convention cited) *Ignaccolo-Zenide v. Romania*, no. 31679/96, (2001) 31 EHRR 212, at para. 77; *Monory v. Romania and Hungary*, no. 71099/01, (2005) 41 EHRR 771, at paras. 51–52; *Bianchi v. Switzerland*, no. 7548/04, 22 June 2006, at para. 60. It should be noted that in its analysis of General Principles, at para. 131, the Grand Chamber referred first to the 1980 Hague Convention, whilst in *X v. Latvia*, when presenting the relevant international instruments, the Grand Chamber placed the 1980 Hague Convention first, at para. 34.

¹⁴⁰ A HUDOC search in English, and in French, reveals only one subsequent use: *Penchevi v. Bulgaria*, no. 77818/12, 10 February 2015, at para. 32.

¹⁴¹ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at paras. 48–50. In the Chamber ruling reference was made to the Preamble, as well as Arts. 7, 9, 14 and 18, at para. 39.

account’,¹⁴² it made no reference to the key provision, Article 11, whereby States Parties shall take measures to combat the illicit transfer and non-return of children abroad, and promote the conclusion of bilateral or multilateral agreements or accession to existing agreements, or indeed Article 41, which provides that nothing in the UNCRC ‘shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State.’ The omission of Article 11 in the Grand Chamber judgment, even if it was not referred to by the Chamber, is particularly noteworthy not only for its relevance but since it was the only UNCRC provision cited in such key early Hague cases as *Iglesias Gil and AUI v. Spain*¹⁴³ and *Maire v. Portugal*,¹⁴⁴ as well as in the non-Hague Convention case of *Bajrami v. Albania*.¹⁴⁵ Taken together, these elements would suggest that even if the Grand Chamber was not seeking to establish a hierarchy of norms with the UNCRC at its pinnacle,¹⁴⁶ it was at the very least framing the international legal order relevant to the interpretation of Article 8 so that the Hague Convention and its primary goal of return was not to be prioritised with the same vigour as had previously occurred.

3.3.1.2 Consideration of Best Interests In the light of the consistency of the judgments which had been handed down since *Ignaccolo Zenide*¹⁴⁷ in supporting the effective operation of the Hague Convention, as well as the accompanying analysis by the Chamber in *Neulinger* and *Maumousseau*, it might have been anticipated that the Grand Chamber in its first child abduction ruling would have acknowledged the rationale underpinning the 1980 Convention, before considering how a return to Israel might impact upon the Article 8 rights of a child who had by then been living in Switzerland for 5 years. Not only did this not happen, but the analysis of the Court to the issue of ‘best interests’ was at best superficial, if not misleading.¹⁴⁸

In section II.A.2 the indeterminacy of the best interests standard was acknowledged but with no consideration of how child abduction fits within the UNCRC framework as a whole.¹⁴⁹ Instead the Grand Chamber followed the bare reproduction of ten Hague Convention articles,¹⁵⁰ and relied upon an assertion that courts of last resort in France, Finland and the United Kingdom had ‘expressly incorporated the concept of the “child’s best interests” into their application of the

¹⁴² *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 51.

¹⁴³ *Iglesias Gil and AUI v. Spain*, no. 56673/00, (2005) 40 EHRR 55, at para. 28.

¹⁴⁴ *Maire v. Portugal*, no. 48206/99, (2006) 43 EHRR 231, at para. 56.

¹⁴⁵ *Bajrami v. Albania*, no. 35853/04, (2008) 47 EHRR 547, at para. 32.

¹⁴⁶ Cf. Rietiker (2012a), p. 391.

¹⁴⁷ *Ignaccolo-Zenide v. Romania*, no. 31679/96, (2001) 31 EHRR 212, at para. 77.

¹⁴⁸ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at paras. 49–56; 58–64.

¹⁴⁹ *Ibid.*, at para. 51. Indeterminacy has long been acknowledged by commentators, see the discussion in Fortin (2009), pp. 292–293.

¹⁵⁰ The principle of return is subsequently referred to in a single sentence, at para. 137. Cf. the detail provided in the Chamber ruling, at paras. 74–78.

[Art. 13(1)(b)] exception’. The justification for this submission, based on limited summaries and isolated quotes, is scarcely convincing.

The House of Lords judgment which was cited, *Re D (A Child) (Abduction: Rights of Custody)*,¹⁵¹ certainly bore factual similarities to *Neulinger*, insofar as extreme delays had led to the child spending almost 4 years in the State of refuge before the final hearing, but the appeal itself turned on the interpretation of Articles 3, 5 and 15. Consideration was given *obiter* to the role of the exceptions by Lady Hale, but not only did she acknowledge the guidance in the Pérez-Vera Explanatory Report that the exceptions should be applied restrictively,¹⁵² but that the authorities of the requested state were:

‘not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13(b), which focuses on the situation of the child, could lead to this result.’¹⁵³

Whilst she accepted that a restrictive application of Article 13 did not mean the exceptions should never be applied at all, and that extreme delay would be a factor in ascertaining whether a child would be exposed to a grave risk of an intolerable situation if sent back, these findings do not equate with the sweeping conclusion drawn by the Grand Chamber on the basis of a short quotation from Lord Hope.¹⁵⁴ In stating that it was ‘impossible to believe that the child’s best interests would be served by his return forthwith to Romania’¹⁵⁵ the latter was making a general observation, related to the delays encountered in the return application. It neither justifies the interpretation given by the Grand Chamber, nor, in the light of Lady Hale’s leading judgment, does it represent the manner in which the House of Lords perceived the exceptions to return in general.

3.3.1.3 Article 8 The primary focus for the Grand Chamber was whether the interference in the family life of the child and mother as understood by Article 8 ECHR was ‘necessary in a democratic society’,¹⁵⁶ it clearly being ‘in accordance with the law’, since it pursued the legitimate aim of protecting the rights and freedoms of the child and his father.¹⁵⁷ In keeping with Strasbourg methodology, the assessment of the applicable ‘General Principles’ contains similarities with earlier rulings, for example in *Neulinger* itself, as well as *Maumousseau*. And so the ‘decisive issue’ as to whether a fair balance had been struck between ‘the competing interests at stake—those of the child, of the two parents, and of public order—’ and whether this was within the margin of appreciation afforded to States, was

¹⁵¹ *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619.

¹⁵² *Ibid.*, at para. 51, referring to the Pérez-Vera (1982) Explanatory Report, para. 34.

¹⁵³ *Ibid.*

¹⁵⁴ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, para. 60.

¹⁵⁵ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 64; *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, at para. 4.

¹⁵⁶ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 91.

¹⁵⁷ *Ibid.*, at para. 106.

replicated almost verbatim from the two judgments which had provided the greatest support for the Hague Convention.¹⁵⁸

Thereafter the Grand Chamber clearly parted company in its reasoning, affirming that the ‘child’s best interests must be the primary consideration’ in the balancing exercise.¹⁵⁹ In this it sought to rely on the general statement in the Hague Convention’s Preamble, although the latter is explicit in stating that it is the interests of *children* which are of paramount importance in matters relating to their custody. However, it then went further still, noting that there was a broad consensus, including in international law, that ‘in all decisions concerning children, their best interests must be paramount’.¹⁶⁰ Somewhat generously, Lady Hale subsequently described this as ‘putting matters a little too high’,¹⁶¹ for while it may be the case in substantive domestic family law,¹⁶² it most certainly is not in international family law and is not supported by the references used by the Grand Chamber to Article 3(1)¹⁶³ or Article 24(2) of the EU Charter.¹⁶⁴ As noted by the Supreme Court in *ZH (Tanzania) v. Secretary of State for the Home Department*: ‘despite the looseness with which these terms are sometimes used, “a primary consideration” is not the same as “the primary consideration”, still less as “the paramount consideration”’.¹⁶⁵

The significance of subjecting Hague abduction cases to the paramountcy standard cannot be overstated, were it to happen it would represent the end of the 1980 Convention as a meaningful remedy, because the return hearing would simply be transformed into a substantive assessment of the merits—the antithesis of what the instrument stands for.¹⁶⁶ Why such formulations were used by the Grand Chamber is unclear, particularly in the light of the comments subsequently made by the Court’s President.¹⁶⁷ It should perhaps be concluded that this was no more than an infelicitous error in drafting. Certainly, as noted above, loose language is not uncommon in ECtHR judgments.¹⁶⁸ Furthermore, there is a general lack of internal

¹⁵⁸ *Ibid.*, at para. 134; *Neulinger and Shuruk v. Switzerland* [Chamber], no. 41615/07, 8 January 2009, at para. 83; *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822, at para. 62.

¹⁵⁹ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 134. In the previous paragraph this direction had been trailed, with the Grand Chamber emphasizing the special character of the ECHR as an instrument of ‘European public order (ordre public) for the protection of individual human beings’.

¹⁶⁰ *Ibid.*, at para. 135.

¹⁶¹ *R. (SG and others) v. Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at para. 214.

¹⁶² *Ibid.*, at para 144, *per* Lord Hughes.

¹⁶³ Art. 3(1), UNCRC states that the best interests of the child shall be ‘a primary consideration’. It is only in Art. 21, in respect of adoption, that the UNCRC provides that ‘the best interests of the child shall be the paramount consideration’.

¹⁶⁴ Again the reference is to the child’s best interests being ‘a primary consideration’.

¹⁶⁵ *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, at para. 25.

¹⁶⁶ Cf. Art. 19, 1980 Hague Convention: ‘A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.’ Cf. dissenting opinion of Judges Berro-Lefèvre and Karakaş in *B v. Belgium*, no. 4320/11, 10 July 2012, discussed below.

¹⁶⁷ Costa (2011).

¹⁶⁸ Fortin (2011), p. 956.

coherence in paragraphs 134–136 since the supporting case law which is cited reflects a more nuanced interpretation of the best interests standard, than either ‘the primary’ or the ‘paramount’ standards. For example, when quoting from its judgment in *Sahin v. Germany*,¹⁶⁹ a decision on contact, the Grand Chamber highlighted that ‘the child’s best interests may, depending on their nature and seriousness, override those of the parents’.¹⁷⁰ Such reasoning sits comfortably with an orthodox application of the Hague Convention,¹⁷¹ and the Hague Convention’s philosophy of return, which was acknowledged by the Grand Chamber, but only in a single sentence.¹⁷²

This pattern has not escaped judicial attention in the United Kingdom, either in general or in respect of *Neulinger* in particular. In *S v. L (No 2)*¹⁷³ Lord Carnwath, acknowledging the ‘slightly different formulations and different shades of emphasis’ in ECtHR judgments,¹⁷⁴ held that the search for undue precision in this area of the law was inappropriate. He added that whilst *Neulinger*, as a Grand Chamber judgment would normally be treated as having greater authority, paragraphs 134–136 ‘were largely designed to summarise earlier authority, and on examination, and in the light of their treatment in later cases, cannot bear the formulaic significance attributed to them by the appellant’s submissions’.¹⁷⁵

The role of the academic commentator is though different to that of counsel litigating an individual case. Whilst it may indeed not always be appropriate to over-emphasise subtle changes in drafting, it is essential to look for broad patterns and so to assess the direction of travel in which the Court is moving. In this regard, whatever doubts might surround the internal consistency of the Grand Chamber ruling in *Neulinger*, the overall effect of its drafting was to re-align the Strasbourg Court’s bearing in the application of Article 8.¹⁷⁶ If contrast were needed it is provided by the judgment in *Maumousseau* where the best interests of the individual child were seen by the majority from the perspective of the child’s right not to be unilaterally removed or retained by a parent.¹⁷⁷ As regards the Preamble, the reference to the best interests of children was contextualized, with it noted that Contracting Parties sought to protect children from the harmful effects of their

¹⁶⁹ *Sahin v. Germany*, no. 30943/96, [2003] 2 FLR 671, at para. 66.

¹⁷⁰ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 134.

¹⁷¹ *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, at para. 51, *per* Lady Hale: ‘A restrictive application of article 13 does not mean that it should never be applied at all’.

¹⁷² *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 137. Cf. detailed treatment in *Neulinger and Shuruk v. Switzerland* [Chamber], no. 41615/07, 8 January 2009, at paras. 74–78 and in *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822, at paras. 68–73.

¹⁷³ *S v. L (No 2)* [2012] UKSC 30, 2013 SC (UKSC) 20.

¹⁷⁴ *Ibid.*, at para. 67.

¹⁷⁵ *Ibid.*, at para. 76.

¹⁷⁶ Indeed that outlier for reform, Judge Pinto de Albuquerque, described *Neulinger* in his concurring opinion in *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. OI-10, as: ‘an evolutive and purposive interpretation of the Hague Convention’.

¹⁷⁷ *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822, at para. 75.

wrongful removal and retention and to establish procedures to ensure their prompt return to their State of habitual residence.¹⁷⁸

In *Neulinger* the concentration on the individual child was further compounded by the manner in which the Grand Chamber advocated that the child's Article 8 rights be respected. To this end the child's best interests were to be assessed in 'each individual case', albeit subject to States' margin of appreciation,¹⁷⁹ and domestic courts were to conduct:

'an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.'¹⁸⁰

This most infamous passage of the Grand Chamber judgment was not however new, the same text is found in *Maumousseau*.¹⁸¹ Crucially however, in the Grand Chamber's presentation of the relevant 'General Principles' it was transformed from an observation, essentially one in support of the position of the French courts in rejecting the application of the Article 13 exceptions, into an apparent obligation, of general application, to ensure fairness in the decision-making process.¹⁸²

Whilst the potential impact of this statement was subsequently acknowledged by a different formation of the Grand Chamber in *X v. Latvia*,¹⁸³ Judge Costa had sought to downplay its significance, remarking in 2011 that it was 'made in the specific context of proceedings for the return of an abducted child'.¹⁸⁴ Although *prima facie* surprising, a case can be made for this restrictive interpretation. In this it is crucial to note that the Grand Chamber majority had accepted,¹⁸⁵ although not without hesitation,¹⁸⁶ that the Swiss return order was within the margin of appreciation afforded to the Federal Tribunal.¹⁸⁷ The principles the ECtHR had enunciated were therefore applied in respect of subsequent developments,

¹⁷⁸ *Ibid.*, at para. 68.

¹⁷⁹ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 138.

¹⁸⁰ *Ibid.*, at para. 139.

¹⁸¹ *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822, at para. 74.

¹⁸² Cf. *Re E (Children) (Abduction: Custody Appeal)* [2011] EWCA Civ 361, [2011] 2 FLR 724, at para. 107, *per* Aikens LJ.

¹⁸³ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at paras. 104–105: *Neulinger*, at para. 139 'may and has indeed been read as suggesting that the domestic courts were required to conduct an in-depth examination of the entire family situation and of a whole series of factors'.

¹⁸⁴ Costa (2011).

¹⁸⁵ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 145.

¹⁸⁶ The scale of the hesitation is quantifiable in that 5 members of the majority expressed disagreement with this position in concurring or separate opinions: Judges Lorenzen, Kalaydjieva, Jočiene, Sajó and Tsotsoria.

¹⁸⁷ It may also be noted that the Grand Chamber did not demur in the finding that the removal of the child to Switzerland was wrongful, at paras. 99–105.

specifically at what would be the time of enforcement.¹⁸⁸ It was in this context therefore where the Grand Chamber concluded that were the child to be sent back then his rights, and those of his mother, would be breached.¹⁸⁹ This disaggregation of the return order from its subsequent enforcement is significant. Enforcement, which has given rise to difficulties in many Council of Europe States, is not a matter governed by the Hague Convention, rather it is a matter for the national law of each State Party. And whilst the ECtHR has done much to support effective enforcement mechanisms and procedures,¹⁹⁰ it did recognise at a very early stage that ‘a change in the relevant facts may exceptionally justify the non-enforcement of a final return order’.¹⁹¹

The ‘General Principles’ as set down by the majority may not have had enforcement at their core, but this was the issue on which they ended and where a large passage from *Maumousseau* was quoted.¹⁹² It was moreover immediately after the reference to an ‘in-depth examination’.¹⁹³ Against this context Judge Costa’s defence of *Neulinger* can certainly be understood a little more clearly. Furthermore, contemporaneous support that the majority was not seeking to depart wholeheartedly from the Court’s previous case law can also be derived from some of the concurring opinions. Judge Lorenzen, who was joined by Judge Kalaydjieva, in finding that the Swiss Federal Court had not assessed Article 13 properly, so that there would be a violation of Article 8 irrespective of any subsequent developments,¹⁹⁴ highlighted the unique circumstances of the case. And notwithstanding that he had gone further than the majority opinion, he clarified that he was not casting doubt on the Hague Convention, nor questioning ‘the application of that convention in this Court’s case-law to date’.¹⁹⁵ He further added that the refusal to return the child would not undermine the normal application of the Hague Convention. For his part, Judge Cabral Barreto, who sought to identify the safeguards which would allow for the child’s return without entailing a violation of Article 8, affirmed that he was against anything that could be seen as amounting to acceptance of attitudes that would result in the Hague Convention ‘becoming a dead letter’.¹⁹⁶

¹⁸⁸ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 145.

¹⁸⁹ *Ibid.*, at paras. 145–151. In this the Grand Chamber considered its case law on the expulsion of aliens: *Maslov v. Austria*, no. 1638/03, [2009] INLR 47, at para. 77; *Emre v. Switzerland*, no. 42034/04, 22 May 2008, at para. 68.

¹⁹⁰ See above at Sect. 2.3.

¹⁹¹ *Sylvester v. Austria*, no. 36812/97, (2003) 37 EHRR 417, at para. 63.

¹⁹² *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 40, citing from *Maumousseau* (para. 83).

¹⁹³ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 139.

¹⁹⁴ See also the joint separate opinion of Judges Jočiene, Sajó and Tsotsoria.

¹⁹⁵ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 0–I9.

¹⁹⁶ *Ibid.*, at para. 0–II16.

3.3.1.4 Reaction in England & Wales In England appellate courts acted promptly in curtailing any potential *Neulinger* effect in the interpretation and application of the Hague Convention.

In *Re E (Children) (Abduction: Custody Appeal)*¹⁹⁷ the family law specialists on the Court of Appeal panel simply did not accept that a fundamental change of approach had been intended. Black LJ noted that there had been nothing explicitly disapproving of *Maumousseau* in the majority judgment,¹⁹⁸ and that it would be ‘extraordinary’ if paragraph 139 contemplated a radical departure from Hague Convention practice.¹⁹⁹ Aikens LJ however relied upon a more technical approach to negate the effect of the ‘in-depth examination’ standard. In this he held that the ECtHR was not a tribunal whose function was to interpret Hague Convention provisions, rather it was only if a domestic court was alleged to have violated the ECHR in its interpretation of the Hague Convention that the latter must be considered,²⁰⁰ but in so doing the ECtHR would be concentrating on the relevant ECHR Article and not the interpretation of the Hague Convention.²⁰¹ This also found favour with the Supreme Court,²⁰² which after explaining how the Hague Convention was devised with the best interests of individual abducted children, as well as of children generally, as a primary consideration, was happy to accept the explanation of Judge Costa as regards *Neulinger*. Delivering the judgment of the Court, Lady Hale and Lord Wilson also noted that a return which was not ordered mechanically or automatically, but rather examined the particular circumstances of the particular child, was ‘not the same as a full blown examination of the child’s future’.²⁰³ And, if properly applied, it would be unlikely that the Hague Convention would lead to a violation of Article 8 rights, whether of the child or either parent.²⁰⁴

3.3.2 Post *Neulinger* Case Law

The fallout from *Neulinger* may have been successfully contained in the United Kingdom, but in Strasbourg the situation was quite different, serving only to

¹⁹⁷ *Re E (Children) (Abduction: Custody Appeal)* [2011] EWCA Civ 361, [2011] 2 FLR 724.

¹⁹⁸ *Ibid.*, at para. 117.

¹⁹⁹ *Ibid.*, para. 123. See also, at para. 65, *per* Thorpe LJ.

²⁰⁰ *Cf. Monory v. Romania and Hungary*, no. 71099/01, (2005) 41 EHRR 771, at para. 81 as regards the interpretation of rights of custody under Art. 3, 1980 Hague Convention.

²⁰¹ *Re E (Children) (Abduction: Custody Appeal)* [2011] EWCA Civ 361, [2011] 2 FLR 724, at paras. 102, 108. See also at para. 70 *per* Thorpe LJ. The ECtHR has undoubtedly strayed into the direct interpretation of Hague Convention articles on various occasions. This is evident in the case of *Carlson v. Switzerland*, no. 49492/06, 8 November 2008, at para. 77 with regard to the exceptions of consent and acquiescence; in the Grand Chamber ruling in *X v. Latvia*, no. 27853/09, (2014) 59 EHRR 100, at para. 116 as to Art. 13(1)(b), 1980 Hague Convention and, at para. 117, with regard to Art. 20, 1980 Hague Convention; and in *Blaga v. Romania*, no. 54443/10, 1 July 2014, at para. 80, in respect of the interpretation of Art. 13(2), 1980 Hague Convention. See in particular Rietiker (2012a), at pp. 389–390. *Cf. López Guió v. Slovakia*, no. 10280/12, 3 June 2014, at para. 115, where the Court did note that it had no jurisdiction *ratione materiae* to examine issues of compliance with the Hague Convention taken alone.

²⁰² *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at para. 31.

²⁰³ *Ibid.*, at para. 26.

²⁰⁴ *Ibid.*

increase the confusion and debate as to how the Court perceived the relationship between Article 8 and the Hague Convention. On the one hand there was a series of decisions on admissibility, rejecting applications by abducting mothers and children where it was argued that return orders had breached their Article 8 rights.²⁰⁵ Whilst these made due reference to *Neulinger*, in contrast to the Grand Chamber majority judgment the spirit and rationale of the 1980 Convention were also fully embraced. And so, for example, in *MR v. Estonia*²⁰⁶ the First Section acknowledged the Hague Convention's return presumption, as well as the necessity for a strict interpretation of the exceptions.²⁰⁷ Furthermore the necessity for expedition was re-affirmed and it was decided that return proceedings were not meant to determine the merits of the custody issue.²⁰⁸ This apparent re-avowal of the Court's traditional interpretation of Article 8 *vis-à-vis* international child abduction,²⁰⁹ which had so re-assured the Court of Appeal in *Re E*,²¹⁰ was though off-set by notable Chamber judgments in which the 'in-depth examination' standard was applied in a more literal sense.

Whilst on one occasion this was used to establish that the decision-making process leading to the establishment of the Article 13(1)(b) exception had been flawed,²¹¹ it has more commonly been associated with non-returns. In *X v. Latvia*²¹² the Chamber referred to an in-depth investigation as being a 'duty',²¹³ as well as emphasizing the 'paramount interests'²¹⁴ of the child when finding that the interference in the family life of the child and abductor brought about by the return order to be disproportionate. In reaching this conclusion, and finding a breach of Article 8, the Chamber noted, *inter alia*, that national courts must pay due respect to the 'arguable claims' brought by the parties in the light of Article 13(1)(b), to ensure that a return was in the child's best interests. Furthermore, the Latvian court should have assessed whether there were sufficient safeguards to render the child's return to Australia in her best interests.²¹⁵

In *B v. Belgium*²¹⁶ the Court, although it did acknowledge the modalities and principles underpinning the Hague Convention, upheld the complaint of the abductor and child who argued that the Court of Appeal of Ghent had neither examined the entire family situation in sufficient depth, nor treated the child's best

²⁰⁵ *Van den Berg v. Netherlands*, no. 7239/08, 2 November 2010 (by majority); *Lipkowsky and McCormack v. Germany*, no. 26755/10, 18 January 2011 (unanimously); *Tarkhova v. Ukraine*, no. 8984/11, 6 September 2011 (unanimously); *MR v. Estonia*, no. 13420/12, (2013) 56 EHRR 136 (by majority).

²⁰⁶ *MR v. Estonia*, no. 13420/12, (2013) 56 EHRR 136.

²⁰⁷ *Ibid.*, at para. 43.

²⁰⁸ *Ibid.*, at para. 42.

²⁰⁹ Cf. *Maumousseau and Washington v. France*, no. 39388/05, (2010) 51 EHRR 822.

²¹⁰ *Re E (Children) (Abduction: Custody Appeal)* [2011] EWCA Civ 361, [2011] 2 FLR 724.

²¹¹ *Karrer v. Romania*, no. 16965/10, 21 February 2012.

²¹² *X v. Latvia* [Chamber], no. 27853/09, 13 December 2011.

²¹³ *Ibid.*, at para. 73.

²¹⁴ *Ibid.*, at para. 72.

²¹⁵ *Ibid.*, at para. 73. This was reprised by the majority in the Grand Chamber ruling, at para. 108.

²¹⁶ *B v. Belgium*, no. 4320/11, 10 July 2012.

interests as paramount.²¹⁷ The Court highlighted the Court of Appeal's failure to verify itself the reality of the risks of the child being exposed to an intolerable situation, as set out in the psychological reports submitted by the mother;²¹⁸ the fact it did not base its decision on the consideration that there were no grounds objectively justifying the mother's refusal to return, but simply proceeded on the basis that it was most unlikely the mother would go back to the United States where she risked imprisonment and the loss of parental authority; and that the time the child had spent in Belgium should have been taken into account to consider more deeply the actual implications of a return order. The Court concluded that the Court of Appeal had not therefore been in a position to determine whether there was a risk within the meaning of Article 13(1)(b), and that the decision-making process had not met the procedural requirements inherent in Article 8, thereby the latter article would be breached if the return order were enforced.

The difference in emphasis in these majority rulings,²¹⁹ as well as the manner in which the Chambers embraced their task, is clear and shares none of the ambiguity which shrouded the approach of the Grand Chamber in *Neulinger*.²²⁰ The response from the United Kingdom Supreme Court to the *Latvia* Chamber ruling was direct and uncompromising,²²¹ whilst extremely forceful dissenting opinions, recognizing this state of affairs, were handed down in both the *Latvia* and *Belgium* cases.²²² In the latter, Judges Berro-Lefèvre and Karakaş held that the majority had disregarded its own guidance²²³ in simply substituting its own conclusions on the best interests

²¹⁷ Ibid., at para. 66. As in *Neulinger*, see above n. 122, the Court, at paras. 35–41, exercised its discretion under Art. 39 of the Rules of Court to grant interim measures, which led to the return order being stayed.

²¹⁸ Ibid., at para. 72. The Chamber further noted that the Public Prosecutor's Office had recommended such an independent evaluation. Such verification was endorsed by the Grand Chamber in *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 116.

²¹⁹ Reference may also be made to the unanimous ruling in *Raban v. Romania*, no. 25437/08, [2011] 1 FLR 1130, at para. 36, where the *Neulinger* reasoning was re-iterated, with the Chamber unambiguously adding that: 'the concept of the child's best interests should be paramount in the procedures put in place by the Hague Convention'. The interpretation provoked an official response by the Secretary General of the Hague Conference at the 41st Meeting of the Committee of Legal Advisers on Public International Law in Strasbourg on 17 March 2011: Van Loon (2011). A referral to the Grand Chamber, which was supported by the UK and Germany (see *Re E (Children) (Abduction: Custody Appeal)* [2011] EWCA Civ 361, [2011] 2 FLR 724, at para. 12), was ultimately refused. See also *Šneersone and Kampanella v. Italy*, no. 1437/09, (2013) 57 EHRR 1180 where *Neulinger* was applied in respect of a return order made under the Brussels IIa Regulation, Art. 11(8).

²²⁰ The reliance on the 'in-depth examination' standard was however also the basis for a finding that the decision-making process leading to the establishment of the Art. 13(1)(b), 1980 Hague Convention, exception had been flawed: *Karrer v. Romania*, no. 16965/10, 21 February 2012.

²²¹ *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at para. 38, per Lord Wilson: 'With the utmost respect to our colleagues in Strasbourg, we reiterate our conviction, as Reunite requests us to do, that neither the Hague Convention nor, surely, article 8 of the European Convention requires the court which determines an application under the former to conduct an in-depth examination of the sort described. Indeed it would be entirely inappropriate.' See McEleavy (2012), p. 36.

²²² Additionally, an extremely thoughtful and considered concurring judgment was provided by Judges Tulkens and Keller, in the *Belgium* case, explaining their support for the majority and seeking to promote conciliation between the different views expressed. This is considered below.

²²³ *B v. Belgium*, no. 4320/11, 10 July 2012, at paras. 59–60.

of the child, and by acting effectively as a court of fourth instance. They expressed concern that what they described as the exceptional outcome in *Neulinger* was becoming the rule and cautioned that the detailed reasoning of the Ghent Court of Appeal should not have been regarded as arbitrary because the Strasbourg Court happened to have reached a different view, one that was based moreover solely on the papers. Pointedly, they further recognized that requiring an in-depth review of the whole family's situation would indeed nullify the distinction between return proceedings and substantive custody hearing, and ultimately void the Hague Convention of its primary purpose.²²⁴

3.3.3 *X v. Latvia—A Re-appraisal by the Grand Chamber?*

When the *X v. Latvia* Chamber ruling was referred to the Grand Chamber it may reasonably have been anticipated that certainty, in one direction or another, would finally return. However, after a seemingly interminable wait for judgment of 13½ months,²²⁵ the outcome was quite different. 16 of the 17 judges may have agreed on the general principles to be applied in cases of child abduction covered by the Hague Convention,²²⁶ and in this the primary doubts surrounding the *Neulinger* judgment were ostensibly laid to rest,²²⁷ but they split equally on how those procedural standards should be applied to the facts of the case. The obvious advantage of common principles was therefore lost since they were immediately applied in diametrically opposed ways. And so, as subsequent case law has proved, the divisions in Chamber rulings have merely been perpetuated.

3.3.3.1 A Restatement of General Principles During the long gestation period the presentation and construction of the Grand Chamber judgment were perfected, and on this occasion no overt perception could arise that the standing of the Hague Convention was in any way being downgraded or marginalised. In the exposition of 'Law and Practice', the 1980 instrument was cited first and contextualized, with detailed reference to the Explanatory Report,²²⁸ as well as more recent Guides to Good Practice.²²⁹ In the Court's assessment of the applicable 'General Principles' it first re-affirmed how treaty commitments entered into by a State subsequent to the entry into force of the ECHR in respect of that State may engage its responsibility for ECHR purposes, but then, in a first step towards repairing the self-inflicted damage caused by *Neulinger*, it recalled that diverging commitments must be

²²⁴ They also underlined that the grave risk of harm envisaged by Art. 13, 1980 Hague Convention should not only be based on separation from the abducting parent.

²²⁵ The hearing took place on 10 October 2012, with the judgment delivered on 26 November 2013.

²²⁶ The 17th member of the panel, Judge Pinto de Albuquerque, delivered a concurring opinion, but held, at para. OI-2, that he disagreed with the 'equivocal principles' set out by the majority at paras. 105–108.

²²⁷ Cf. the concurring opinion of Judge Pinto de Albuquerque, where he held, at para. OI-21, that *Neulinger* was 'alive and well'.

²²⁸ For criticism of the use of the Explanatory Report as an aid to interpretation, see *RS v. Poland*, no. 63777/09, 21 July 2015, dissenting opinion of Judges Nicolaou, Wojtyczek and Vehabović, at para. 9.

²²⁹ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at paras. 35–36. Reference was then made to the UNCRC, at paras. 37–40, albeit with no mention of Art. 11, and to the EU Charter, at para. 41.

harmonised as far as possible so that they produce effects that were fully in accordance with existing law.²³⁰ Turning specifically to child abduction, the Court reiterated that Article 8 ‘must be interpreted in the light of the Hague Convention’ as well as the UNCRC and relevant principles of international law.²³¹ Again it cautioned against conflict between treaties and held that the ECHR should be interpreted and applied in a manner that rendered its guarantees practical and effective.²³²

In presenting the balancing of the competing interests at stake, the Grand Chamber amended its reference to the best interests of the child, noting that these must be ‘of’ primary consideration, rather than ‘the’ primary consideration.²³³ But it is of much greater significance that in a clear attempt to move away from the ambiguity of its previous ruling, it added that: ‘the objectives of prevention and immediate return correspond to a specific conception of “the best interests of the child”’.²³⁴ The Hague philosophy was then explained and accepted,²³⁵ with the Grand Chamber providing the explicit confirmation, absent in *Neulinger*, that a child’s best interests:

‘cannot be understood in an identical manner irrespective of whether the court is examining a request for a child’s return in pursuance of the Hague Convention or ruling on the merits of an application for custody or parental authority, the latter proceedings being, in principle, unconnected to the purpose of the Hague Convention.’²³⁶

It explained that in Hague proceedings best interests were to be evaluated in the light of the exceptions, but noted that in this, domestic courts enjoyed a margin of appreciation, but this was subject to European supervision.²³⁷

In the light of the dissenting opinion of Judges Berro-Lefèvre and Karakaş in the *Belgium* case, it is of note that the Grand Chamber further reiterated that it would not be substituting its own assessment for that of the domestic courts, rather it would be reviewing whether the decision-making process of the domestic court was fair, had allowed the parties to present their case fully and that the best interests of the child were defended.²³⁸ The Grand Chamber then stated, confirming the extra-judicial view of Judge Costa, that the infamous reference to ‘an in-depth examination of the entire family situation’ in *Neulinger*, at paragraph 139, did not in itself set out any principle for the application of the 1980 Convention by

²³⁰ Ibid., at para. 92, quoting from *Nada v. Switzerland*, no. 10593/08, (2013) 56 EHRR 593, at paras. 168–170.

²³¹ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 93.

²³² Ibid., at para. 94.

²³³ Ibid., at para. 95. Cf. *Neulinger*, at para. 134.

²³⁴ Cf. *Re F (A Minor) (Abduction: Custody Rights)* [1991] Fam. 25, at p. 30.

²³⁵ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 97. The Grand Chamber noted that the paramountcy of the best interests of children was associated in the Hague Convention with restoration of the *status quo*, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the individual child’s interests.

²³⁶ Ibid., at para. 100.

²³⁷ Ibid., at para. 101.

²³⁸ Ibid., at para. 102.

domestic courts.²³⁹ It was only at this point that the Grand Chamber turned to the crucial issue of how a harmonious interpretation of the Hague Convention and the ECHR could be achieved.

For the Grand Chamber, the co-existence of what it previously described as an instrument of a procedural nature and a human rights treaty,²⁴⁰ required first, that the exceptions to return be genuinely taken into account by the requested court and, second, that they be evaluated in the light of Article 8. In this there were procedural obligations in that domestic courts must not only consider arguable allegations of a ‘grave risk’ for the child in the event of return, but also make rulings on the exceptions as a whole giving specific reasons, which must not be ‘automatic and stereotyped’.²⁴¹ Almost as if such guidance might be interpreted as once again moving away from the Court’s traditional interpretation of the Hague Convention, which it was apparently trying to rehabilitate, the Grand Chamber immediately re-asserted the position adopted in *Maumousseau*²⁴² that the exceptions must be interpreted strictly.²⁴³ In this way the Grand Chamber might be viewed as seeking to achieve an appropriate equilibrium, not only with the Hague Convention, but equally with the spirit of the *Neulinger* judgment.

Harmonisation²⁴⁴ in presentation is quite different however to viability and effectiveness in practice.²⁴⁵ On paper, a strict interpretation of exceptions to return might appear feasible whilst at the same time facilitating a genuine appraisal of arguable allegations, with these being upheld or rejected on the basis of sufficiently reasoned decisions. But balancing standards and ultimately rationales which scarcely rest easily together, is less straightforward. In summary proceedings focussed on return, an ‘effective examination’,²⁴⁶ depending on how it is interpreted and applied, carries the risk of causing delay, or leading the court to stray into the underlying custody dispute.²⁴⁷ Similarly there is a clear danger in complying with such requirements that abductors will be able to exploit them to their own advantage, whether through delays or tactical manoeuvres. There is moreover a

²³⁹ *Ibid.*, at para. 105. Judge Pinto de Albuquerque, in his concurring opinion at para. OI-4, framed this issue around Art. 19, 1980 Hague Convention, noting that detailed examination by the court in the host country did not imply any change of jurisdiction over parental responsibility, which remained in the State of the child’s habitual residence.

²⁴⁰ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, (2012) 54 EHRR 1087, at para. 145; *X v. Latvia* [Chamber], no. 27853/09, 13 December 2011, at para. 72. Cf. *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. OI-8, where Judge Pinto de Albuquerque, in his concurring opinion, described this description of the Hague Convention as ‘an over-simplistic view’.

²⁴¹ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 107.

²⁴² *Ibid.*, at para. 73.

²⁴³ *Ibid.*, at para. 107.

²⁴⁴ Cf. at para. 92.

²⁴⁵ Cf. at para. 94.

²⁴⁶ This was the core criterion for the Grand Chamber, and the majority in finding that a breach of Art. 8 ECHR had occurred, at para. 119. Judge Pinto de Albuquerque, in his concurring opinion, at para. OI-17, submitted that this did not represent a meaningful change from the ‘in-depth examination’ standard of *Neulinger*.

²⁴⁷ *Re M (Republic of Ireland) (Child’s Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, at para. 119.

further challenge for courts, conceptual as well as practical, in how to balance a strict standard of interpretation, with a sufficiently detailed assessment of the exceptions.²⁴⁸ It is inevitable that great discipline will be required if an appropriate and effective application of the Hague Convention and compliance with Article 8 ECHR is to be achieved.

The difficult task presented by the re-stated General Principles was almost certainly increased for domestic courts, and the Grand Chamber's putative equilibrium unsettled, by the terms of the final paragraph of the section. Building on the Chamber judgment,²⁴⁹ this set down a very general obligation, of uncertain scope, that courts making return orders must satisfy themselves that 'adequate safeguards are convincingly provided' in the child's State of habitual residence, including 'tangible protection measures', where a known risk exists.²⁵⁰ Whilst the implications of this were not fully explored, reference need only be made to *Šneersone*²⁵¹ for an extremely broad vision of what this might entail. The 8 judges of the dissent on the other hand appeared to be satisfied with the more traditional, presumptive model employed by the Latvian courts that there were 'no grounds for doubting the quality of the welfare and social protection provided to children in Australia' in the light of evidence that Australian legislation provided for the security of children and their protection against ill-treatment within the family.²⁵² Undoubtedly steps such as the inspection of proposed accommodation or the qualitative evaluation of post-return contact and care²⁵³ would ensure a more complete protection for the individual abducted child, but such an approach also risks lengthening abduction proceedings and ultimately broadens their scope. Desirable as the detailed verification of safeguards might be, in the absence of any clear mechanism for this to be achieved, or indeed resourced, its feasibility must be questioned.²⁵⁴ Equally the

²⁴⁸ The standard in England & Wales is found in the Supreme Court judgments: *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257.

²⁴⁹ *X v. Latvia* [Chamber], no. 27853/09, 13 December 2011, at para. 73, discussed above.

²⁵⁰ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 108.

²⁵¹ *Šneersone and Kampanella v. Italy*, no. 1437/09, (2013) 57 EHRR 1180, at paras. 95–96. An intra-EU abduction case, the application to the ECtHR concerned a return order under Art. 11(8), Brussels IIa Regulation, it being argued, *inter alia*, that this was contrary to the child's best interests. The child's return had previously been refused by a Latvian court of first instance under Art. 13(1)(b), 1980 Hague Convention.

²⁵² *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. OII-9.

²⁵³ Cf. *Šneersone and Kampanella v. Italy*, no. 1437/09, (2013) 57 EHRR 1180, at paras. 95–96.

²⁵⁴ The UK Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, at para. 37, called on the Hague Conference to elaborate a mechanism to facilitate the recognition and enforcement of protective measures. The Court of Appeal and lower courts have however turned to the 1996 Hague Convention on the Protection of Children as a mechanism to bring about the enforceability of undertakings, considering these to be 'measures of protection': *Re Y (A Child) (Abduction: Undertakings Given for Return of Child)* [2013] EWCA Civ 129, [2013] 2 FLR 649. Whether this accords with the disconnection of the 1996 Hague Convention and the Brussels IIa Regulation (Art. 61) is another matter. The UK Supreme Court will consider the operation of the 1996 Hague Convention in late 2015, after granting permission to appeal the Court of Appeal judgment in *Re J (A Child) (Reunite International Child Abduction Centre intervening)* [2015] EWCA Civ 329, [2015] 3 WLR 747.

sufficiency of the justification for such an apparent extension of the Article 8 positive obligations could be questioned given that the Grand Chamber based this on no more than the Hague Convention Preamble's reference to children being returned to 'the State of their habitual residence'.²⁵⁵

3.3.3.2 Application of the General Principles The challenges inherent in applying the Grand Chamber's clarified 'General Principles' were immediately and fully exposed when the 16 supporting judges divided equally on whether the Riga Regional Court had indeed satisfied the procedural requirements inherent in Article 8 when dealing with the father's application for the return of his daughter to Australia. The Latvian courts had provided, within a very short timeframe,²⁵⁶ what might be described as a textbook, strict response to the primary carer mother's arguments under Article 13.²⁵⁷ The appellate court held that there was no evidence to substantiate the mother's allegations against the father. Furthermore it refused to rely upon a psychological assessment indicating the likelihood that immediate separation from the mother would cause the child psychological trauma, since the Hague proceedings were not concerned with custody rights. And it found that there was no evidence to suggest a return to Australia would threaten the child's safety, as Australian legislation provided for the security of children and their protection against mistreatment. For the 8 judges of the dissent whilst the reasons given by the Latvian courts were expressed succinctly, they had nevertheless adequately responded to the mother's arguments and satisfied the procedural requirements imposed by Article 8. The difference in approach of the majority however was nothing short of remarkable, and of potentially great significance for the future application of the Hague Convention. This is because the majority was not simply favouring a more exacting application of the re-stated Article 8 obligations, but was clearly reversing the burden of proof in the application of Article 13,²⁵⁸ and confirming the extent of the obligations on the requested State to confirm or exclude the existence of a grave risk of harm.²⁵⁹

The majority found that the mother's submission of the psychologist's certificate, as well as her argument that the father had criminal convictions and had ill-treated both her and the child, sufficed to require the Latvian courts: 'to carry out meaningful checks, enabling them to either confirm or exclude the existence of a

²⁵⁵ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 108.

²⁵⁶ The return request was received by the Latvian Central Authority on 22 September 2008, the first instance judgment was delivered on 19 November and the appeal decided on 26 January 2009; a total of little more than 5 months.

²⁵⁷ This was described, somewhat pejoratively by Judge Pinto de Albuquerque, at para. OI-18, as a 'superficial, hands-off handling of the child's situation'.

²⁵⁸ One of the 8 judges subsequently submitted that this was not the case, see *Phostira Efthymiou et Ribeiro Fernandes v. Portugal*, no. 66775/11, 5 February 2015, dissenting opinion of Judges Steiner and Sicilianos, discussed below n. 291.

²⁵⁹ See also *Carlson v. Switzerland*, no. 49492/06, 8 November 2008, at para. 77, where the reversal of the burden of proof by a Swiss court of first instance in the application of Art. 13(1)(a), 1980 Hague Convention, was a factor in finding that there had been a breach of Art. 8 ECHR.

“grave risk”²⁶⁰. And by failing to take into the account the allegation, which was substantiated by a certificate issued by a professional, Article 8 was found to have been breached.²⁶¹ As subsequently noted by the dissent, in proceedings under Article 13 the burden of proof is of course on the party alleging the grave risk of harm to provide evidence. But under the majority’s formula it would seem that once a *prima facie* case had been made out by the abductor, then the onus would be transferred to the court seised to determine whether it did or did not exist.²⁶² Notwithstanding that the majority sought to discount minor inconveniences from the scope of Article 13(1)(b),²⁶³ such reframing of the operation of the Hague Convention, which offers a clear procedural advantage to the abductor, could only serve to cause delay and require a level of investigation more appropriate in a full merits assessment of the issue of custody than one centred on jurisdiction and return.²⁶⁴ For the majority however the requirement for expedition placed on domestic courts did not ‘exonerate them from the duty to undertake an effective examination of allegations made by a party on the basis of one of the exceptions expressly provided for’.²⁶⁵ This must be confirmation that despite the sanitizing of the *Neulinger* judgment in *X v. Latvia* there is a clear desire on the part of many Strasbourg judges to steer the treatment of international child abductions away from the prioritization of return, towards a security first approach, prioritizing the individual abducted child. This is articulated most clearly in the concluding comments of Judge Pinto de Albuquerque:

‘Justice for children, even summary and provisional justice, can only be done with a view to the entirety of the very tangible case at hand, i.e. of the actual circumstances of each child involved. Only an in-depth or ‘effective’ evaluation of the child’s situation in the specific context of the return application can provide such justice.’²⁶⁶

²⁶⁰ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 116. In this it referred to the equivalent approach adopted by the Court in *B v. Belgium*, no. 4320/11, 10 July 2012, at para. 72. The dissent, at para. OII-10, was un-persuaded that the Latvian courts should have taken the initiative by requesting further information from the Australian authorities about the father’s criminal profile, previous convictions and the charges of corruption allegedly brought against him.

²⁶¹ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 117. The fact that the report had been instructed by the mother alone did not absolve the Latvian courts from the obligation of effective examination. The majority added that the ability of the mother to maintain contact with her child should also have been considered.

²⁶² The majority sought to reinforce this interpretation by noting that Art. 8 ECHR rights fell within the scope of Art. 20, 1980 Hague Convention, and appearing to suggest that the latter provision should be applied by the Latvian courts of their own motion. It is indeed the case that Art. 20 does not specify where the burden of proof falls, but as Anton noted in the aftermath of the Convention’s adoption, it should fall to the person opposing the return to make a *prima facie* case as to the exception’s applicability, Anton (1981), p. 553. On the application of Art. 20 in the UK, see *J v. C* [2015] EWHC 2047 (Fam.), at paras. 67–86.

²⁶³ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 116.

²⁶⁴ This ‘easy critique’ was rejected by Judge Pinto de Albuquerque, at para. OI-16, who held on the contrary that: ‘An “in-depth” judicial enquiry does not have to be obtuse, ill-defined and self-indulgent.’

²⁶⁵ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. 118.

²⁶⁶ *X v. Latvia* [GC], no. 27853/09, (2014) 59 EHRR 100, at para. OI-21.

3.3.4 The Effect of *X v. Latvia*

In marked contrast to the aftermath of *Neulinger*, the ruling in *X v. Latvia* has failed to generate any judicial commentary or analysis in the United Kingdom in the first 20 months since it was handed down. This is reminiscent of the pre-*Neulinger* era when ECtHR case law was rarely considered,²⁶⁷ indeed it was only after the first Grand Chamber ruling that mention was made to the *Maumousseau* judgment in English case law.²⁶⁸ Whilst this may be due to the clarity of directions given by the Supreme Court in *Re E*²⁶⁹ and *Re S*,²⁷⁰ the last 2 years have seen several attempts to invoke Article 20 to oppose a return order,²⁷¹ one of which saw the exception successfully invoked for the first time in one of the United Kingdom jurisdictions.²⁷² There is however no indication from the formulation of the judgments that this development is directly linked to the evolution in Strasbourg reasoning,²⁷³ though the courts undoubtedly have a greater sensitivity for Article 8 and human rights arguments.²⁷⁴

In Strasbourg the picture continues to be mixed. Whilst a preponderance of judgments have indeed displayed a strong support for the objective of return and a strict interpretation of the exceptions in their application of Article 8,²⁷⁵ some of these have included dissenting opinions which appear to reject the fundamental premise of the Hague Convention.²⁷⁶ Moreover, in the case of *Phostira Efthymiou et Ribeiro Fernandes v. Portugal*²⁷⁷ the Court favoured an approach which is difficult to reconcile with the 1980 instrument. Even within the judgments supportive of the 1980 Convention, there is evidence of the tension between the different facets of the *Latvia* ruling. For example in *Blaga v. Romania*²⁷⁸ the Court expressed concern at the emphasis placed on the objections of the children to a return, the insufficient balancing of the applicant father's right to family life; the failure to consider the feasibility of return, or its impact, on the children; as well as the domestic authorities failure to act expeditiously in the return proceedings. And for these reasons the Court found that the decision-making process under domestic law did

²⁶⁷ See for example: *Re K (Children) (Rights of Custody: Spain)* [2009] EWHC 1066 (Fam.), [2010] 1 FLR 57, at para. 54, (rights of unmarried fathers); *Re H (Abduction: Jurisdiction)* [2009] EWHC 2280 (Fam.), [2010] 1 FLR 598, at para. 28, (delays in the conduct of Hague return proceedings).

²⁶⁸ *Re E (Children) (Abduction: Custody Appeal)* [2011] EWCA Civ 361, [2011] 2 FLR 724.

²⁶⁹ *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144.

²⁷⁰ *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257.

²⁷¹ *F v. F* [2014] EWHC 3971 (Fam.); *J v. C* [2015] EWHC 2047 (Fam.).

²⁷² *SP v. EB* [2014] EWHC 3964 (Fam.), at para. 22.

²⁷³ If there was a factor in *SP v. EB* it may have been the desire to avoid the case falling within the scope of the Art. 11(6)-(8) trumping mechanism of the Brussels IIa Regulation, see at para. 27.

²⁷⁴ *J v. C* [2015] EWHC 2047 (Fam.), at paras. 67–86.

²⁷⁵ *Rouiller v. Switzerland*, no. 3592/08, 22 July 2014; *Gajtani v. Switzerland*, no. 43730/07, 9 September 2014; *GS v. Georgia*, no. 2361/13, 21 July 2015.

²⁷⁶ For consideration of recent jurisprudence (in English) see Deschuyteneer (2015), p. 148.

²⁷⁷ *Phostira Efthymiou et Ribeiro Fernandes v. Portugal*, no. 66775/11, 5 February 2015.

²⁷⁸ *Blaga v. Romania*, no. 54443/10, 1 July 2014.

not satisfy the procedural requirements inherent in Article 8.²⁷⁹ However, at the same time it re-affirmed that the interests of the child were paramount in abduction cases, which led to the surprising declaration that after more than 13 months away, the Romanian courts may have been justified to hold that the children's family situation had changed and that it was in their best interests to remain.²⁸⁰ Ultimately however this reasoning was not pursued, the Court concluding that the change in circumstances had been considerably influenced by the slow reaction of the Romanian authorities.²⁸¹

In *RS v. Poland*²⁸² it is the dissenting judgment of 3 of the 7 judges which stands out for refusing to accept that there had been a violation of the applicant father's Article 8 rights. The children had travelled to Poland with their mother for a vacation, but whilst there the mother issued divorce proceedings and was granted interim custody. She then refused to return and the father issued Hague Convention proceedings. In clear opposition to the principles of the 1980 Convention, the Polish courts declined to find that the retention had been wrongful, given the interim order that had been awarded in the mother's favour. Judges Nicolaou, Wojtyczek and Vehabović began by noting that the mother could not expect a decent life in Switzerland and had no alternative but to seek a new beginning in her home country. They held that the Polish court was entitled to consider that it unavoidably had to deal with the custody issue alongside the divorce petition. And further, they added that the decision not to return the children could justifiably be regarded as falling within the ambit of the Hague Convention's exceptions. Such a blatant conflation of merits issues with adjudication on the question of return pales in comparison however when compared with the comments of Judge Dedov in *Adžić v. Croatia*.²⁸³ In a sole dissenting judgment, he stated bluntly that the summary return mechanism was 'not suitable for the assessment of rights under Article 8 of the Convention, as the Hague Convention does not provide a comprehensive approach to the conduct of the return proceedings'. Like the dissenting judges in *RS v. Poland*, he highlighted the serious vulnerability of mothers who were completely dependent on their husbands, as well as the vulnerability of children, especially the very young, for whom separation from the mother would lead to distress. He argued that a child's best interests, from a personal development perspective, would depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents as well as his environment and experiences. He further submitted that the separation of a child under seven from his mother would always lead to a grave risk of harm for the purposes of Article 13(1)(b).²⁸⁴

²⁷⁹ Judge López Guerra joined by Judge Motoc dissented on the violation of Art. 8 ECHR.

²⁸⁰ *Blaga v. Romania*, no. 54443/10, 1 July 2014, at para. 88.

²⁸¹ *Ibid.*, at para. 89.

²⁸² *RS v. Poland*, no. 63777/09, 21 July 2015.

²⁸³ *Adžić v. Croatia*, no. 22643/14, 12 March 2015.

²⁸⁴ As regards children aged 7–13, he suggested that return was more realistic, unless there was a really grave risk, whilst teenagers should have the right to decide for themselves and express their own opinion.

*Phostira Efthymiou et Ribeiro Fernandes v. Portugal*²⁸⁵ involved a standard wrongful retention of a very young child by her mother following an agreed vacation. A return order made within 4 months was overturned on appeal and, after almost 19 months in Portugal, the Supreme Court, favouring a strict interpretation of Article 13(1)(b), reinstated the original order. The ECtHR, by a 5:2 majority, found that the decision-making processes had not met the procedural requirements inherent in Article 8. The reasoning employed in the judgment and dissenting opinion re-awakens the differences of emphasis present in the Grand Chamber ruling in *X v. Latvia*. For the majority the reasoning of the domestic courts was particularly succinct and based on limited evidence. The previous situation of the child was unknown,²⁸⁶ and referring to Article 13(3) of the Hague Convention it was noted that additional information had not been sought from the Cypriot central authority concerning the situation of the father, as well as his inability to care for the child, which had been alleged by the mother.²⁸⁷ Furthermore evidence presented by the mother, including a psychologist's report, was not considered by the Supreme Court.²⁸⁸ The proceedings were also deemed to have lasted an excessive period of time,²⁸⁹ and the child appeared settled in her new environment.²⁹⁰ In contrast, Judges Steiner and Sicilianos found that the Supreme Court had acted within its margin of appreciation in giving a stricter interpretation to Article 13(1)(b) than the Court of Appeal.²⁹¹ Referring to the majority's application of the General Principles in *X v. Latvia*, they noted that it was implicit, but clear, that the exceptions were to be interpreted strictly and that the burden of proof was on the person opposing return. Strikingly they observed that if a return was refused each time a psychologist considered there would be emotional consequences for young child then the 1980 Convention would risk being emptied of its meaning and purpose.

Whilst *Phostira Efthymiou* is now an isolated example of the Court showing an indulgent approach faced with a primary carer abduction involving a young child, it would be disingenuous simply to categorise it as a rogue case.²⁹² Taken together with the dissenting opinions in the judgments it shows rather that there is a cohort of Strasbourg judges who do see the resolution of international child abduction cases in very different terms to those set out in the Hague Convention, one in which return is far from prioritised. Moreover, given the formation of Chambers and the manner in which judgments are composed,²⁹³ it is inevitable that this fragmentation of case

²⁸⁵ *Phostira Efthymiou et Ribeiro Fernandes v. Portugal*, no. 66775/11, 5 February 2015.

²⁸⁶ *Ibid.*, at para. 48.

²⁸⁷ *Ibid.*, at para. 49.

²⁸⁸ *Ibid.*, at para. 50.

²⁸⁹ *Ibid.*, at para. 52. The mother was not deemed responsible for this delay.

²⁹⁰ *Ibid.*, at para. 53.

²⁹¹ The significance of this interpretation, and indeed the dissent, is increased when it is recalled that Judge Sicilianos was part of the majority which had advocated a more permissive application of the General Principles to the facts in *X v. Latvia*.

²⁹² A referral to the Grand Chamber by the Portuguese government was rejected: ECHR 179 (2015), 3 June 2015.

²⁹³ See above n. 119, in particular see: Loucaides (2010), p. 61.

law will continue, bringing uncertainty where the Strasbourg Court once acted as such a unifying force.²⁹⁴

4 Conclusion

The *Neulinger* and *X v. Latvia* cases, through their factual matrices as well as in the complex, sometimes ambiguous and indeed conflicting nature of their judgments and dissenting opinions, encapsulate the challenges posed by international child abduction in the twenty-first century. A problem once seen in simple terms meriting a relatively straightforward solution has been transformed. Wrongful removals and retentions carried out by primary carers, most of whom will be mothers who will have stronger ties to the State of refuge than to the State of the child's habitual residence, undoubtedly fit less easily into the summary return mechanism created in 1980. Against such a context there is inevitably greater temptation for courts to allow return proceedings to drift into a consideration of substantive custody issues. This may be accentuated where there is evidence of vulnerability on the part of the abductor, whether through having experienced domestic violence or being in an economically weak position. But greater sensitivity to such issues also opens the door to exploitation, most notably should the abductor refuse to return with the child, leading to a potentially harmful separation. At the same time the essential ill which the Hague Convention seeks to remedy remains unaltered; unilateral action, which if unchecked minimises the chances of the child concerned having a meaningful relationship with the left behind parent and in turn, were it to become widespread, would simply encourage such behaviour, to the detriment of all children.

The divergent views that have been expressed and continue to emanate from Strasbourg as to how compliance with Article 8 ECHR should be achieved in the application of Hague Convention, show that there is, at best, uncertainty as to how the interests of abducted children should now be protected. There is attraction therefore in Eekelaar's assessment and his classification²⁹⁵ of standard Hague return applications²⁹⁶ as falling within the 'indirect' category of best interests.²⁹⁷ Indeed this reflects the balancing of rights and interests put forward by the drafters and now applied in many States Parties. It also facilitates a holistic application of the UNCRC, allowing account to be taken in particular of Article 11 and Article 41. However, as with any binary system of categorization there are limits to its

²⁹⁴ Cf. concluding comments of Judge Dedov in *Adžić v. Croatia*, no. 22643/14, 12 March 2015. Calling for a best interests assessment in each individual case he held: 'a contradictory rule gives rise to unstable court practice: few judgments are delivered without a dissenting opinion, and there is nothing to prevent national courts from coming to opposite conclusions in similar situations regarding the applicability of Article 13 [...]'.
²⁹⁵ Eekelaar (2015), p. 3, see above n. 127.
²⁹⁶ Those made within the 12 month period prescribed within Art. 12(1), 1980 Hague Convention.
²⁹⁷ Where settlement is proved for the purposes of Art. 12(2), 1980 Hague Convention Eekelaar notes that the decision becomes one directly about children.

application. For example when applied to *Neulinger*²⁹⁸ the merits of Eekelaar's criticism that the two modes of application of the best interests principle were not distinguished, must surely depend on whether the reasoning of the Grand Chamber is to be treated as applying to the summary return in general or just the enforcement of the return order, as the facts of the case demanded.²⁹⁹ By the time the Grand Chamber delivered its judgment, the child was settled in Switzerland as a matter of fact, even if not for the purposes of Article 12(2) of the 1980 Hague Convention. And so any decision taken at that stage would have been of direct, not indirect effect, to him.

Whilst such extreme examples are rare, it is not uncommon for children to spend extended periods of time in the State of refuge whilst return proceedings and appeals run their course. The more integrated a child becomes, then the more difficult it is to present the issue of return as only of indirect effect. Hague Convention proceedings, by virtue of their particular nature, might therefore be better regarded as hybrid in that they have the potential to evolve from having only an indirect to a direct impact on the children involved. In this a parallel may be drawn with the reasoning employed by Judges Tulkens and Keller in their concurring opinion in *B v. Belgium*.³⁰⁰ They noted that ideally a child should be returned within a year and that the more a child became integrated into his new surroundings, the weaker the information to assess the risk of return and the less serious the decision on return would be. Making an analogy with the *Bosphorus* principle of equivalent protection of fundamental rights,³⁰¹ they noted that where there was such delay the guarantees offered by the Hague Convention and Article 8 could no longer be considered as equivalent, making it more difficult to draw a distinction between the procedural and substantive obligations deriving from the latter provision.³⁰²

Such clarity of guidance is helpful. It reflects moreover how the 1980 Hague Convention, as originally envisaged, can continue to be the most appropriate solution to cases of unilateral removal or retention. If the standard judicial response were simply to sanction a more child-centric approach to the application of the exceptions where the child had spent an extended period of time in the State of refuge, this would merely be an incentive to abductors to obfuscate and delay. The more viable and appropriate option therefore, which will also avoid potential conflict with Article 8 ECHR, would be the introduction of more effective measures to promote expeditious outcomes.³⁰³ But this can only be achieved if States provide the necessary investment, especially if effective examinations are to be undertaken where exceptions are raised,³⁰⁴ with, potentially, greater use made of Article 13(3) of the 1980 Hague Convention. Resources will also be required if adequate

²⁹⁸ Eekelaar (2015), p. 17.

²⁹⁹ See above.

³⁰⁰ *B v. Belgium*, no. 4320/11, 10 July 2012.

³⁰¹ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, no. (45036/98), (2006) 42 EHRR 1.

³⁰² *B v. Belgium*, no. 4320/11, 10 July 2012, concurring opinion Judges Tulkens and Keller, at para. 15.

³⁰³ Schuz (2013), pp. 442–443.

³⁰⁴ Fiorini (2006), p. 279.

protection is to be provided for children and primary carer abductors upon return. With such steps, as the majority view from Strasbourg makes clear, there is no reason why the principle of summary return cannot continue to be in the best interests of the individual child and children collectively for many years to come, although in the current financial climate the prospect of greater State involvement must be far from certain.

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